SOME REFLECTIONS ON INTERNATIONAL COMMERCIAL ARBITRATION

by

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submitted in partial fulfilment of the requirements for the degree of

MASTER OF LAWS WITH SPECIALISATION IN INTERNATIONAL ECONOMIC LAW

at the

UNIVERSITY OF SOUTH AFRICA

SUPERVISOR: PROF EC SCHLEMMER

OCTOBER 2003

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SUMMARY

Arbitration is central to the settlement of transnational commercial disputes. This dissertation discusses arbitration as an alternative method of dispute settlement as opposed to litigation. The work surveys the difficulties relating to international commercial arbitration and the enforcement of awards, and efforts made to overcome them.

The research is divided into four chapters. The first chapter introduces the reader to the work. It gives a general background to international commercial arbitration and briefly explains what the dissertation is all about. Chapter two is definitional. It examines some of the definitions of international commercial arbitration and contains the author’s thoughts on this issue. The author is of the view that the traditional definitions do not properly address the concept. It is concluded that the question whether an arbitration is international should largely depend on whether international norms are used to resolve the dispute rather than by reference to geographical considerations. This chapter also weighs the advantages and disadvantages of arbitration as against litigation. Chapter three deals with recognition and enforcement of awards. This is considered crucial since at the end of the day, parties to arbitration would want to enforce their awards in a court of law, in the event of non-compliance. Since the award might be made in a foreign country, enforcement may be problematic. The chapter examines efforts made in international and domestic law to overcome such problems and achieve enforceable awards. A selection of multi-lateral, regional and domestic laws is examined. This chapter also discusses problems of enforcing awards against states and steps taken to overcome them. The final chapter deals with general conclusion and suggestions. It is suggested that efforts should be made to harmonise international commercial arbitration. This can be achieved both in domestic and international law.
KEY TERMS
Arbitration; Enforcement; International; Commercial; Dispute resolution; Settlement; Transnational; Trade; Awards; Recognition
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<td>Comparative and International Law Journal of Southern Africa</td>
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<td>CPD</td>
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<td>EC</td>
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CHAPTER 1
INTRODUCTION

The last fifty years have witnessed an increasing dynamism in international trade. This is the natural result of technological advancements. Better and faster machinery have resulted in an increase in the volume of produced merchandise, which has in turn led to producers seeking markets beyond their borders. With the startling technological advances achieved in communication and travel, and the emerging global community, commercial activities transcend geographical and political boundaries.\(^1\) The increase in transnational trade has naturally resulted in international commercial disputes\(^2\) that encompass different legal systems.

Business enterprises prefer independent parties to settle their disputes rather than national courts. They often agree to refer their disputes to an individual or group of individuals called arbitrators, for determination. The agreement to arbitrate is usually included in the contract and is known as an arbitration clause. By this method, businessmen agree that in the event of a dispute, such dispute will be submitted to arbitrators for determination. Arbitrators are preferred because they are better placed than national courts to deal with the several legal problems that arise from transnational relations. Arbitrators employ procedures that are more flexible, and readily apply international trade norms that are used and more acceptable to international merchants, than national laws that may not cater for their needs. Further, businessmen often do not trust foreign legal systems.\(^3\)

Since the parties may select the arbitrators, they can ensure that experts determine their disputes. The parties can set up *ad hoc* arbitration panels or submit their dispute to any of the internationally established arbitration bodies that are found in many parts of the world. The most widely used international arbitral tribunals are the International Court of Arbitration of the International Chamber of Commerce in Paris, and the London Court of International Arbitration. Arbitration, which is regarded as a quicker and cheaper

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alternative to national courts,⁴ is therefore rapidly becoming the preferred alternative for
the settlement of commercial disputes.⁵

This work examines developments and problems relating to international commercial
arbitration. It examines legal provisions relating to the recognition and enforcement of
international awards in a number of legal systems as well as in international law. An
excursion is made into problems relating to the enforcement of investment disputes
against states and measures that have been taken to overcome them. The work proffers
solutions, which involve both international and national mechanisms.

⁴ Ungar “The Enforcement of Arbitral Awards Under UNCITRAL’s Model Law on International
⁵ Mwenda and Gobir “International Commercial Arbitration and the International Centre for Settlement of
CHAPTER 2
DEFINING ARBITRATION

1. DEFINITION
1.1 Generally
It is often difficult to arrive at a generally acceptable definition of a concept as scholars usually have differing points of view. Most writers on arbitration have avoided defining the topic and have instead attempted to distinguish it from other methods of dispute resolution.

Le Roy Bennet defines arbitration as the application of legal principles to a controversy within limits previously agreed upon by the disputing parties.\(^1\) This definition further states that a panel of judges or arbitrators is created either by special agreement of the parties or by an existing arbitral treaty. In agreeing to submit a dispute to arbitration, the disputants also agree in advance to be bound by the decision of the arbitrators.\(^2\) In my view, this definition is a comprehensive description of arbitration. It states that arbitration has both a contractual and jurisdictional element.\(^3\) The powers of the arbitrators to act emanate from the agreement of the parties. They also perform their functions within a legal framework of laid down rules embodied in national legal systems.\(^4\) It is also true to say that they perform “judicial-like” functions. Like national courts, they conduct hearings, issue subpoenas, take evidence from witnesses and sometimes award costs. They are also expected to observe the rules of natural justice. These functions and responsibilities are akin to those performed by courts. However, by making reference to “a panel of judges or arbitrators,” Le Roy Bennet’s definition does not refer to sole arbitrators. More than often, single arbitrators are appointed by parties to determine their dispute.

According to Sutton arbitration is an agreement to submit present or future disputes to private persons for resolution, whether they are contractual or not.\(^5\) This definition

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\(^2\) Ibid.
covers two aspects. It covers the arbitration clause by which the parties agree to submit future disputes to arbitration as well as the referral of existing disputes to arbitration. One can say that this definition is lacking in that it merely embodies a contractual element and has no jurisdictional considerations. It is true that arbitration is a method used for the settlement of disputes between parties, contractual or otherwise. Nevertheless, arbitral proceedings are also rule-based. The arbitrators are governed by substantive laws that are applicable to the dispute and procedural laws that regulate the proceedings. These may be those of an arbitration institution, national laws or international law. Further, in the event that a party refuses to heed to an award of the tribunal, the courts may be approached for enforcement. It follows therefore that arbitration has a strong jurisdictional element.

1.2 Four main theories

Over the years, four main definitional theories have evolved. They are the following-

a) The jurisdictional theory, which specifies that arbitration is based on state sovereignty and their authority to prescribe laws regulating arbitration.

b) The contractual theory, which is based on the freedom of parties to enter into contracts. This theory lays emphasis on the fact that arbitrators derive their authority by virtue of the agreement of the parties, under the auspices of national legal systems.

c) The hybrid theory, which is a combination of the jurisdictional and contractual theories.

d) The autonomy theory, which is relatively new. This theory suggests that arbitration is based on norms created by merchants and is therefore an independent legal system.

Hong-Lin rejects all four theories, stating that they fail to “provide a satisfactory explanation covering current developments and all the different aspects of international commercial arbitration.” However, he seems to accept the hybrid theory when he states that “different aspects of arbitration, such as the triangular relationship

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7 Fox Ibid.
between parties, arbitrators and states, can only be satisfactorily explained by a theory that comprises both contractual and jurisdictional elements. Non However vigorously disagrees with the thesis that arbitration is based on the agreement between the parties. According to him, the jurisdictional elements are the fundamental bases for arbitration. He concludes that the contractual element only operates within the limits of the jurisdictional elements which are the foundation of the arbitration framework. By so doing he upholds the hybrid theory but cuts short its contractual limb in the process. Hong-Lin's theory would have been apt some forty years back when arbitration was firmly controlled by state laws and judicial processes. Several legal systems have moved from the days when arbitration functioned strictly within the clutches of judicial systems. Arbitration is now market driven. The participants demand a say in the manner their disputes are resolved. In response to this demand, several countries have revised their laws to cater for party autonomy. International arbitration institutions constantly revise their rules to meet the challenges of the private sector. Though it is trite that arbitrators must comply with the relevant mandatory state laws and public policy considerations, the wishes and desires of the parties are not as limp as Hong-Lin suggests. The private sector is a compelling force in shaping the landscape of arbitration. Therefore any attempt to cut short the contractual limb in defining arbitration will make such definition incomplete.

Arbitration results from the agreement of the parties. It however functions within a legal framework. State laws and institutions do not only ensure that arbitral proceedings are fair, but that their awards are enforced. Therefore a mere contractual or jurisdictional definition devoid of each other cannot stand. Together, they form a symbiotic whole. A proper definition can only embody a combination of both. One may therefore say that arbitration is the process by which private individuals, acting within the permissible legal framework, determine a dispute submitted to them by agreement of the disputants.

1.3 Commercial arbitration

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9 Ibid 151.
10 Ibid.
It is important to note that for an arbitration to be regarded as commercial it must arise from a commercial transaction. The second footnote to the UNCITRAL Model Law on International Commercial Arbitration of 1985 urges a wide interpretation of the term “commercial.” In terms of this provision, commercial arbitration is not limited to contractual matters. In my opinion, this is the reasonable approach. Though the Model Law gives examples of matters that may be regarded as commercial, the list is not exhaustive. In addition, this definition has not been adopted by all countries. This may result in a situation whereby courts in different countries can give varying interpretations to the term “commercial.” But one can say that this definition is important. It must be noted that a number of national courts give a narrow interpretation to the term “commercial” in article I(3) of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards of 1958. This naturally poses an obstacle to the enforcement of awards. If the Model Law is widely adopted by states together with this definition, this problem would be overcome.

1.3.1 Differences between commercial and other arbitrations

It is important to distinguish arbitrations of a commercial nature from other arbitrations. One obvious reason being that in civil law countries, there is a dichotomy between commercial and other disputes. Commercial disputes mainly arise from the activities of merchants or traders in the usual course of their business. In civil law countries, contracts of this nature are distinguished from other kinds of obligations. This is reflected by the fact that commercial contracts are usually governed by special codes of commercial law separate from the general law of obligations. This distinction is of great significance since in some of these countries, only commercial disputes can be submitted to arbitration. In addition, the laws of some countries like South Africa and Botswana exclude certain non-commercial matters like matrimonial causes and matters relating to the status of persons from arbitration.

The Geneva Protocol on Arbitration Clauses of 1923 recognises a distinction between commercial and other disputes. It imposes an obligation on contracting states to

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11 See paragraph 5 of this chapter.
12 See for example the case of India Organic Chemicals Ltd v Chemtex Fibres Inc 1978 AIR 108.
recognise the validity of an arbitration agreement concerning disputes arising from commercial matters or any other matter capable of settlement by arbitration. This is a recognition of the distinction between commercial and other matters.\textsuperscript{14} In addition, the Protocol permits states to limit their obligations to contracts that are considered as commercial under their laws.\textsuperscript{15} A similar provision exists under the New York Convention.\textsuperscript{16}

2 THE NATURE OF ARBITRATION

2.1 Private nature

Arbitration is a private mechanism for the resolution of disputes.\textsuperscript{17} Not only are proceedings held in private, they arise from the agreement of private parties. Sometimes when negotiating a contract, the parties agree that any dispute that may arise will be submitted to arbitration. The agreement to arbitrate is usually included as a clause in the contractual agreement. The arbitrators derive their authority from the agreement to arbitrate.\textsuperscript{18} Arbitration is therefore the result of an agreement between the parties. It is a private arrangement between the arbitrators and the parties and is governed by the agreement. Further, in international commercial arbitration, international trade practices which are widely recognised by merchants, but do not have the force of law are usually applied by mandate of the parties. Courts on the other hand are not only public institutions, proceedings are also held in public.

2.2 Legal nature

Though arbitration is a private arrangement between parties, it needs the support of the public legal system in order to be effective.\textsuperscript{19} Arbitral awards are enforced through courts in the event of non-compliance. Arbitration is similar to litigation in that the parties are entitled to a fair hearing, and the award is not a negotiated settlement. It is a decision reached by the application of legal rules.\textsuperscript{20}

\textsuperscript{14} Ibid.
\textsuperscript{15} Article 1.
\textsuperscript{16} Article 1(3).
\textsuperscript{17} Hill The Law Relating to International Commercial Disputes 2 ed (1998) 597.
\textsuperscript{18} Ibid.
\textsuperscript{19} Ning Ibid.
\textsuperscript{20} Castel et al Ibid 597.
International commercial arbitration is governed by the private regime of the arbitration agreement that confers jurisdiction on the arbitral tribunal, the public regime of national legal systems, international conventions\textsuperscript{21} and norms agreed to by the parties. One may therefore conclude that arbitration cannot entirely be cocooned in a private veil. Matters of public interest such as the right to a fair hearing are relevant. Therefore, if an arbitral proceeding does not meet certain minimum legal standards, it might come into conflict with the (public) legal system.

3. ARBITRATION VERSUS LITIGATION
3.1 Advantages and disadvantages of arbitration
3.1.1 Advantages of arbitration
3.1.1.1 Speed
Perhaps the most attractive feature of arbitration is brevity. Arbitration usually consumes less time than litigation. Proceedings are less technical and the rules are more relaxed. Because there are less procedural hurdles, unnecessary delays are usually kept to a minimum. In addition, the awards are final. Ordinarily, there are no appeals, the hearing of which can take years.\textsuperscript{22}

3.1.1.2 Expertise
Arbitrators may be chosen because of their experience or expertise in a particular trade area. The parties are therefore given an opportunity to appear before experts rather than judges who may actually be laymen in the area of dispute and lack business experience. Experienced arbitrators are able to grasp the salient issues quickly and to make quality awards.\textsuperscript{23} Historically, arbitrators were tradesmen engaged in the area of trade from which a dispute arose. However, modern international arbitrators are usually international lawyers and academics.\textsuperscript{24} They mostly have little or no knowledge of the industry involved and this likens them to courts where judges are usually non-experts in the trades or industries from which conflicts arise.

\textsuperscript{21} Ibid.
\textsuperscript{22} Sanders \textit{Quo Vadis Arbitration} (1999) 3.
\textsuperscript{23} Redfern and Hunter \textit{Ibid} 19.
3.1.1.3 Neutrality

It is believed that arbitral tribunals tend to be more neutral than national courts that may carry the nationality of one of the parties. Unlike judgments that may carry the nationality of one of the parties, awards are seen as neutral.\(^\text{25}\) This view is reinforced by the fact that the parties have a hand in selecting the arbitrators. Again, this perceived neutrality gives confidence to the parties and the issue of a court discriminating against foreigners does not arise.\(^\text{26}\)

3.1.1.4 Flexibility

The procedure of an arbitral tribunal is flexible and less cumbersome than litigation. Sometimes the parties select the applicable rules. It is therefore easily understood by the parties. Because of its flexible nature, arbitration tends to be brief. The lengthy delays of litigation are thus avoided.\(^\text{27}\) However when the parties have legal representation, they may tend to insist on strict compliance with evidential and procedural rules. The result is that the proceedings may be turned into a private courtroom. This tendency must be resisted as it defeats the intention of the parties to avoid the rigours of courtroom procedure.

3.1.1.5 Confidentiality

Several businessmen prefer arbitration because of its confidential nature. Proceedings are not necessarily held in public and this helps to preserve good business relations. In the case of *Hassmeh Insurance v Mew*\(^\text{28}\) Colman J had this to say:

> “If the parties to an English law contract refer their disputes to arbitration they are entitled to assume at the least that the hearing will be conducted in private. That assumption arises from a practice which has been universal in London for hundreds of years and I believe undisputed. It is a practice which represents an important advantage of arbitration over the courts as a means of dispute


\(^{26}\) *Ibid* 23.

\(^{27}\) Bennett *International Business* (1999) 158.

\(^{28}\) 1993 Lloyds Rep 243 at 246-247.
resolution. The informality attaching to a hearing held in private and the
candour to which it may give rise is an essential ingredient of arbitration."29

Also, awards are not usually published. Though some awards have been published in
recent years, in many cases steps are taken to conceal the identity of the parties. It is
submitted that the publication of awards is a step in the right direction. Arbitrators
will be able to consult them, and be informed as to how issues facing them have been
resolved in the past. It will also develop a unified practice. However, it is not always
possible to maintain confidentiality. In the event that an award is to be enforced in a
court of law, or an application is made to set it aside, the details of the transaction are
made public.30

3.1.1.6 Costs
Businessmen usually prefer arbitration because it is usually brief and cost effective.31
Shorter proceedings mean that legal fees are reduced. If the matter is a simple one, the
parties might not even need to hire attorneys. Generally, arbitration is cheaper in costs
to the parties as compared to litigation.

3.1.2 Disadvantages of arbitration
It can be said that though arbitration is preferred for the purposes of business
expediency, it also has its drawbacks. Some of the attributes that make arbitration
advantageous can also serve to its disadvantage.

3.1.2.1 Costs
Though arbitration is thought to be cost effective, this is not always so. The parties
usually pay the arbitrators’ fees. Established arbitration institutions also charge
administrative fees. International arbitration fees can be quite substantial.32 Some
arbitration institutions structure their fees in accordance with the sum of money

29 The private nature of arbitral tribunals was also emphasised in the arbitration of Esso/BHP v
Schultsz and Van Den Berg) 223 at 224.
31 Rawlins “Aspects of the UNCITRAL Regimes for Procurement and for International Commercial
Arbitration, and Government International Commercial Contracts in the Common Wealth Caribbean”
1997 7 Journal of Transnational Law and Policy 41 at 65.
claimed. The higher the sum claimed, the higher the charges. This is so regardless of the complexity of the matter or the number of hours spent by the arbitrators. If the amount claimed is large, the parties may have to pay higher fees even if few hours of work are done by the arbitrators. When contrasted with a complex and lengthy dispute where the parties pay less fees because the sum claimed is less, this system of charging is clearly faulty. Also, the assertion that arbitration tends to be brief can prove to be untrue if the award is resisted and annulment proceedings are instituted. If the award is annulled, fresh arbitration proceedings or litigation will have to be commenced. This is time consuming and increases costs. To overcome this difficulty, conventions and some domestic laws, limit the situations under which awards can be set aside.

3.1.2.2 Consolidation

Another shortfall of the arbitration system is that it is not possible to bring multi party disputes together in a single arbitral proceeding. Generally, arbitral tribunals have no powers to consolidate actions. Though arbitral tribunals themselves do not have powers of consolidation, current trends are moving towards permitting consolidation by judicial means. In The Netherlands for example the courts can consolidate arbitral proceedings if the parties agree. Though the Model Law contains no provisions for consolidation, some countries have included such provisions in their adopted versions. In terms of these legislations the courts may order consolidation. In Australia, an application for consolidation can be made to the arbitral tribunals instead of the courts. The tribunals then jointly debate the matter and if they cannot arrive at a consensus, the respective tribunals proceed without consolidation.

34 Sanders Ibid 7.
35 Ibid.
36 Article 1046 Netherlands Arbitration Act 1986. This arrangement has also been adopted in South Africa’s proposed legislation on international commercial arbitration.
37 Sanders “Unity and Diversity in the Adoption of the Model Law” 1995 11 Arbitration International 1 at 29.
38 For example the Canadian International Arbitration Acts of the common law provinces, the Hong Kong Arbitration Act (for the purposes of domestic arbitration) and all states in the USA that have adopted the Model Law except Connecticut. See Sanders Ibid 30.
39 Ibid 29.
3.2 Advantages and disadvantages of litigation

3.2.1 Advantages of litigation

3.2.1.1 Costs

Litigation can be cheaper in certain respects. While it is true that lengthy proceedings result in more expenses in relation to legal fees, administrative fees are minimal. In litigation all court officials including judges are paid from state coffers. The parties pay very minimal fees for filing their documents. Also, third parties that are not already parties to litigation but might be affected by the decision of a court can intervene in proceedings. Courts can order actions to be consolidated. Therefore, several disputes that are connected can be tried at the same time thereby avoiding a multiplicity of actions and reducing costs.

3.2.2 Disadvantages of litigation

Some of the advantages of arbitration can be said to be the disadvantages of litigation. From a transnational perspective, it is clear that litigation suffers many disadvantages that can be overcome by arbitration.

3.2.2.1 Multiplicity of actions

In transnational litigation since the parties may be in different countries and various parts of the contract may also have been performed in various countries, nothing prevents each party from instituting court action in different countries. A party can institute legal proceedings in one country even though litigation is pending in another country. The parties are also able to embark on “forum shopping.” They may select a particular country to institute proceedings because its laws will work in their favour or because they may be awarded higher amounts in damages. This situation can be avoided by the inclusion of choice-of-forum clauses in contracts. It can also be overcome by arbitration. When the parties agree to arbitrate, they either set up the tribunal themselves or refer the dispute to a particular arbitration institution. This eliminates the possibility of multiple actions that may arise in transnational litigation. Also, international conventions and domestic laws usually prohibit the parties from litigating where there is an agreement to arbitrate.

41 Ibid 18.
3.2.2.2 Uncertainty of legal processes

Transnational litigation also compels parties and their legal advisers to deal with legal systems with which they are not familiar. There are differences between the civil law inquisitorial system, and the common law adversarial system. They differ in rules of procedure and evidence, the manner in which witnesses are called, and the role of judges. The result is that one or more of the parties might be confronted by an alien legal system. With arbitration however, not only have international arbitration institutions succeeded in creating rules that blend both legal systems, the parties themselves are able to determine the applicable rules of procedure.

Resort to arbitration is on the rise as commercial activities continue to grow. Indeed, it cannot be denied that more and more businessmen prefer arbitration because it tends to be less cumbersome than court proceedings. It is usually brief and confidential in nature. It is also preferred over other alternative dispute resolution measures since it is enforceable. Whereas an arbitral award is enforceable, a conciliation or mediation settlement cannot be enforced in the event of default.

4. DIFFERENCES BETWEEN INTERNATIONAL AND DOMESTIC ARBITRATION

4.1 Domestic arbitration

Domestic arbitration is usually limited to and concerns a single state. The laws of a single state usually govern the contract, and the arbitral proceedings are governed solely by the laws of the place of arbitration. The parties are often residents of that state. If their assets are found in the state in which the award is made, enforcement will be sought in the courts of that state. In essence, all dimensions of the arbitration are local and no international or foreign interests are involved.

4.2 International arbitration

Traditionally, two tests have been used to determine whether an arbitration is international. The first test concerns the nature of the dispute. The second test is conditioned by territoriality. In terms of the first test, arbitration is considered as

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42 Ibid 23.
international if it involves the interests of international trade. The first test is used in France. In France, international arbitration was previously defined as one in which elements of foreign origins, such as the object of the dispute makes it impossible to simply apply domestic rules of arbitration. With the coming into effect of the New Code on Civil Procedure, an arbitration is described as international "if it implicates international commercial interests." In terms of the second test, the arbitration is considered international where the places of residence of the parties are in different countries. The nationality-of-the-parties test involves reviewing the nationality, place of residence, or place of business of the parties. This approach is used in the United States of America for the purposes of the New York Convention. The Model Law on the other hand embraces both tests. It describes arbitration as international if the places of business of the parties are in different states. Where their places of business are situated in the same state, the arbitration will be international where the situs of the arbitration or the place where a substantial part of the contract is to be performed is in a country different from the country of residence of the parties. It is my considered view that the Model Law also seems to add another test. One may refer to this test as the "declaratory test." The Model Law states that an arbitration will be international if the parties expressly agree that the subject matter of the arbitral agreement relates to more than one country. The question arises as to what will be the situation if two parties resident in the same country agree that the subject matter of their agreement will relate to more than one country, whereas in reality, their contractual relations and the applicable laws are merely localised to their country of residence. It will make no sense to consider such an arrangement as international. Therefore, an agreement that the subject matter of the arbitration will relate to more than one country must be accompanied by acts and circumstances that give it an international character. One may say therefore that an agreement cannot become international merely by declaration of the parties. However, such declaration will be helpful in determining the international nature of the dispute where there are doubts in this regard.

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44 Article 1(3)(a) UNCITRAL Model Law.
45 Section 202 United States Arbitration Act 1925.
46 Article 1(3)(b).
47 Article 1(3)(c).
5. CONCLUSION

The question to be answered is what really is international commercial arbitration. The definition of the term “commercial” in footnote 2 of the UNCITRAL Model Law seems acceptable. It provides that the term “commercial” should simply apply to disputes “arising from all relationships of a commercial nature whether contractual or not.” This includes inter alia any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency exchange, factoring, leasing, construction, consulting, financing, carriage of goods or passengers by air, sea, rail or road, banking transactions. Thus, commercial relations are not merely restricted to the activities of traders. As stated supra, a wide interpretation of the term is preferable.

Several attempts have been made to define “international” arbitration. The traditional view is that the arbitration is international if the transaction relates to more than one country or where the parties are in different countries, or where the place of arbitration is different from where the parties have their places of business. An arbitration is also said to be international if it involves the interests of international trade. In effect the basic requirement in determining whether the arbitration is international is the transnational nature of the contract. This approach appears to have been adopted by the Model Law. It is clear that the existing tests are geographical or territorial in nature. The determination whether an arbitration is international cannot be adjudged by reference to geographical considerations alone.

Another important factor should be considered in determining the international nature of an arbitration. In this regard, the tools governing the dispute must be considered. These tools are the substantive and procedural laws governing the dispute. The arbitration will therefore be international if the parties have selected international legal norms rather than the domestic laws of a particular state. Arbitral proceedings that are decided on the basis of international norms have been erroneously referred to as a-national arbitration. There is no such thing as a-national arbitration. When the arbitration is removed from domestic legal systems by the application of international legal norms, it is simply international arbitration. An award cannot be a-national. This is so because it is widely accepted that the mandatory laws of the place of arbitration should always apply. Therefore the arbitration cannot really be completely severed.
from the laws of the place of arbitration. Also, in the event that a party fails to comply with an award, the enforcing party has to resort to a domestic court for enforcement. Enforcement is made in terms of the laws and public policy of the state where enforcement is sought. Therefore a system that relies on domestic legal systems for enforcement, and therefore has to be recognised by their courts, cannot be said to be "a-national."

It is the treatment of the dispute that gives an arbitration its international character and not the conditions from which the conflict arises. The arbitration is international not merely because the transaction from which the dispute arises is transnational, but because it is determined on the basis of international or non-statal norms. These norms may be general principles of law, international trade practices and usages, procedural rules of international arbitration institutions, the UNCITRAL Rules for international commercial arbitration and rules of procedure drawn up by the parties for use in ad hoc arbitration.

The transnational nature of the contract that leads to the dispute and the actual arbitral proceedings are not one and the same thing. The transnational nature of the contract does not necessarily make any subsequent arbitration international. Though arbitration clauses are usually imbedded in contracts, they are not operative at the time of the contract. They are contingency dispute-resolution clauses which are mechanisms that guarantee the resolution of any future dispute by arbitration. Arbitration clauses do not relate to the contract and how it should be performed but are merely inserted to ensure that the undertaking to arbitrate is irrevocable. Remove the arbitration clause, and the contract remains intact. It is well known that not all arbitration clauses are included in the parties' contract. Also, parties who do not provide for arbitration when making their contract may well resort to arbitration when a dispute arises. In determining whether the arbitration is international, the location of the parties should therefore be of secondary concern. The primary determinant factors should be the content of the arbitration clause and the law applied by the tribunal. The geographical location of the tribunal and the parties will only reinforce the conclusion that an arbitration is international.
CHAPTER 3
RECOGNITION AND ENFORCEMENT OF AWARDS

1. GENERAL
Both domestic law and international conventions prescribe the requirements and procedures for the recognition and enforcement of arbitral awards. In the absence of conventions, difficulties arise in enforcing international awards, as domestic laws do not always make provision for this. With the emergence of conventions, international awards are made more enforceable. International conventions like the New York Convention do not only seek to harmonise the requirements for recognition and enforcement of international awards, but also seek to ensure that such awards enjoy the same treatment as domestic awards. There are both judicial and non-judicial methods of enforcement.

2. RECOGNITION
Recognition is the method by which a court accepts that an award was properly made and therefore enforceable within its jurisdiction. The effect of recognition is therefore to give the award legal efficacy in a particular jurisdiction. Recognition is important in that it can neutralise a losing party's attempt to obtain a new decision from the courts, which may conflict with the award. Recognition proceedings bring finality and at the same time, give the losing party an opportunity to attack the award. The matter is therefore determined once and for all. Recognition proceedings usually relates to non-domestic awards. However, it is possible that recognition can be an issue in respect of domestic awards. For example if a court refuses to grant a domestic award its nationality by refusing to register it on the grounds that it does not comply with its procedural rules, that will amount to non-recognition of a domestic award.2

3. ENFORCEMENT
3.1 Non-judicial enforcement
Business communities have developed sanctions that are usually effective in persuading compliance with arbitral awards. Some of these sanctions include

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2 For example see the case of Societe Europeene d'Etudes et d'Enterprise (S.E.E.E.) v Yugoslavia Trib Cant Vaud 12 Feb 1957.
boycotting the defaulting party, publishing his name and blacklisting him, expelling him from a business or trade organisation and denying him access to future arbitration. These measures are usually effective. Parties are aware of the implications of sanctions and would rather comply with awards than lose valuable business.

3.2 Judicial enforcement

Judicial enforcement is usually necessary when the parties refuse to comply with the award and when non-judicial measures fail. The award is executed by the use of available legal sanctions. Arbitral tribunals do not have powers to enforce their awards and therefore rely on the coercive powers of the courts should a party default. The award is enforced like a judgment. The assets of the defendant are attached and the pecuniary benefits of the award realised. Though recognition and enforcement are distinct, recognition is a prerequisite for enforcement; for a court cannot enforce an award, which it does not recognise. Over the years, conventions have been concluded for the enforcement of international awards. The enforcement of such awards is also possible under some domestic laws especially in respect of states that have adopted the UNCITRAL Model Law.

4. RECOGNITION AND ENFORCEMENT UNDER INTERNATIONAL CONVENTIONS

4.1 Generally

International conventions have no doubt played an important role in the recognition and enforcement of international arbitral awards. As commerce continues to transcend international borders, and businessmen increasingly submit to arbitration, the need to make awards enforceable in various jurisdictions has become even more necessary. Conventions have helped to overcome some of the problems encountered in enforcement proceedings. Recognition and enforcement proceedings are usually sought in the country where the defaulting party has his assets. Since the defaulter may have assets in a country other than his place of residence, the place of enforcement might be unforeseeable at the time of the contract or arbitral proceedings. Therefore, arbitrators cannot always contemplate the possible country of

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enforcement. In addition, domestic arbitration laws vary. These conventions therefore do not only attempt to promote enforcement of foreign and international awards in various jurisdictions but also seek to harmonise enforcement proceedings.

4.2 Multilateral conventions

4.2.1 The Geneva Protocol

The Geneva Protocol on Arbitration Clauses of 1923 is the first significant international convention on arbitration.\(^5\) It was intended to ensure that arbitral awards would be enforced in their states of origin. The Protocol had four principal purposes. Firstly, to oblige contracting states to recognise the validity of agreements to arbitrate disputes between parties who were subject to the jurisdiction of the various contracting states, regardless of where the arbitration took place.\(^6\) Secondly, to require contracting states to ensure that awards made within their jurisdictions are executed in accordance with their domestic laws.\(^7\) Thirdly, to oblige courts in contracting states to refer disputes covered by the arbitration agreement to the agreed arbitrators, rather than proceeding with the matter. Finally, to provide by what rules the arbitral procedure will be recognised as being regulated and to oblige contracting states to facilitate arbitral proceedings in their respective countries.\(^8\)

4.2.2 The Geneva Convention

The aim of the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 was to expand the scope of the Geneva Protocol, so as to make an award enforceable not only in its state of origin, but also in all contracting states.\(^9\) The significance of the Convention is that it reduced the burden of the party seeking enforcement and further removed some of the measures available to the debtor to obstruct the enforcement process.\(^10\)

4.2.2.1 Weaknesses of the Geneva documents

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\(^7\) Article V.
\(^8\) Article II.
Though the Geneva documents played a positive role in promoting commercial arbitration, it soon became clear that their provisions were insufficient to meet the commercial needs of merchants. They had interpretation problems. There was ambiguity for example in the expression “subject to the jurisdiction of different contracting states,” which defines the scope of application of the treaties. It is not clear whether this means subject to the jurisdiction of the courts of a state because of residence, domicile or whether there were some other criteria. The exclusion of awards rendered in a state that is not a party to the Convention is unnecessary because though it is normal for a state to require reciprocity for granting recognition and enforcement in respect of foreign judgments, which are acts of another state, there is less justification in the case of arbitral awards which are not rendered by a public authority. Further, the Geneva documents require a person seeking enforcement of an award in a foreign country to prove that the award was made in compliance with the laws of its country of origin. He had a duty to prove that the arbitral tribunal was constituted in conformity with the laws of the country in which the award was made and that the award had become final in that country. Thus, it was easier for an obstructionist defendant to resist the enforcement of an award than for a plaintiff to obtain one.

4.2.3 The New York Convention

The Geneva documents were the first steps at harmonising recognition and enforcement. However, it soon became clear that they were not sufficient. The International Chamber of Commerce (ICC), which had played an important part in the actualisation of the Geneva Convention, submitted a proposal to the United Nations Economic and Social Council for a new convention for the “Enforcement of International Arbitral Awards.” The fact that the Geneva Convention required that an arbitral award must comply strictly with the rules of procedure of the country where the arbitration took place was problematic. The ICC supported the idea of an “international award” that will be completely independent of national laws. After much deliberation, the United Nations Conference on International Commercial

12 Ibid.
13 Ibid.
14 Ibid.
15 Ibid 290.
16 Ibid.
Arbitration held at New York from the 20th May to 10th June 1958, finally adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.17

4.2.3.1 Scope and application
The Convention applies to the enforcement of arbitral awards made in a territory other than where recognition and enforcement are sought, and also in relation to awards that are not considered as domestic awards in the state where recognition and enforcement are sought.18 The Convention has two reservations which the parties may adopt. In terms of these reservations, parties to the Convention may at their option restrict its applicability in their country. In this regard, they may apply the Convention on the basis of reciprocity. In other words a state may declare that it will apply the Convention only to awards made in other contracting states. A state may also restrict its application to only differences arising out of legal relations that are considered as commercial under its national laws.19

4.2.3.2 Binding effect of the agreement
In order to give binding effect to arbitral agreements, the state parties to the New York Convention undertake to recognise written arbitral agreements relating to matters that are capable of settlement by arbitration.20 The question whether a matter is capable of settlement by arbitration should be determined with reference to the law of the state where enforcement of the agreement is sought. This will be the place where the arbitration is conducted. But this does not make the law of the place where the award is to be enforced irrelevant. Article V(2)(a) provides that recognition and enforcement may be refused if a court in the country where recognition and enforcement of the award is sought, finds that the subject matter of the arbitration is not capable of arbitration under its laws.

The Convention further ensures that parties honour their agreement to arbitrate by ousting the jurisdiction of courts, where the parties have agreed to arbitrate. In the event of a dispute, parties will find it difficult to litigate where a valid arbitration agreement exists. Article II(3) empowers courts before which legal proceedings are

17 Ibid.
18 Article I.
19 Article I(3).
20 Article II(1).
pending, to refer the matter to arbitration at the request of a party unless it finds that the agreement is null and void, inoperative or incapable of being performed.

4.2.3.3 Recognition and enforcement of awards
State parties to the Convention undertake to recognise arbitral awards as binding. Awards are enforceable in accordance with the rules and procedures of the country where recognition and enforcement are sought.\textsuperscript{21} The Convention also provides that states should not impose “substantially more onerous conditions” on foreign awards nor subject them to higher fees.\textsuperscript{22} It is submitted that the use of the word “substantially” is in recognition of the practical reality that the conditions for the enforcement of domestic awards and international awards cannot be exactly the same. For example, foreign and international awards (if made outside the place of enforcement) naturally have to undergo a process of authentication. What the Convention requires in essence, is that international and domestic awards must receive equal treatment as far as possible.

4.2.3.4 Procedure for recognition and enforcement
In terms of article IV an application for recognition and enforcement should be accompanied by an authenticated original arbitration agreement and award, or certified copies.\textsuperscript{23} If the agreement or award is in a foreign language, the party applying for recognition and enforcement should provide a certified translation.\textsuperscript{24}

4.2.3.5 Refusal of recognition and enforcement
Article V of the New York Convention ensures that judicial powers of review are limited.\textsuperscript{25} It excludes review on the merits and limits it to certain basic legal safeguards such as where the tribunal infringes on the due process of law and public policy.\textsuperscript{26} Refusal may take place at the instance of a party, or at the instance of the court.

\textsuperscript{21} Article III.
\textsuperscript{22} Ibid.
\textsuperscript{23} Article IV(1).
\textsuperscript{24} Article IV(2).
\textsuperscript{25} Buhring-Uhle \textit{Arbitration and Mediation in International Business} (1996) 76.
\textsuperscript{26} Ibid.
4.2.3.5.1 Refusal at the instance of a party

In terms of article V, a party may challenge an award if he can establish a number of issues. Article V(1)(a) provides that an award may be challenged if the parties were under some incapacity under the applicable law, if the agreement is invalid under the law selected by the parties, or if such law was not specified under the law of the state where it was made. This provision goes to the root of the agreement. If the agreement to arbitrate is not valid, any ensuing award will be invalid.\textsuperscript{27} Articles V(1)(b) to (d) relate to procedural defects.\textsuperscript{28} In terms of these provisions, refusal may take place if the losing party was not given proper notice of the appointment of the arbitrators or of the proceedings or was otherwise unable to present his case,\textsuperscript{29} if the decision covers matters that were not covered by the agreement to arbitrate,\textsuperscript{30} if the constitution of the arbitral tribunal or the arbitration procedure was not carried out in accordance with the terms of the agreement or in the absence of such agreement, in accordance with the laws of the state where the arbitration took place.\textsuperscript{31} In my opinion, article V(1)(a) is an indication that the Convention encourages some autonomy in that it permits the parties to select the applicable law particularly the procedural law. This being the case an award resulting from an arbitration that is governed by the rules of an international arbitration institution or some law other than the place of arbitration should be enforceable in terms of the Convention. Article V(1)(d) also recognises that the parties may be given first preference to determine the rules of procedure. With this level of flexibility, the Convention should apply to international arbitration.

Article V(1)(e) provides that a court may refuse enforcement if the award has not yet become binding on the parties, or has been set aside or suspended in the country of origin or under the law of which it was made. The question whether an award that is not yet binding in its state of origin is enforceable in a foreign state is the subject of wide debate. In this regard, it is important to determine when an award becomes binding. According to some scholars an award is binding when it can no longer be subjected to review. According to another school of thought an award is binding when

\textsuperscript{28} Ibid.
\textsuperscript{29} Article V(1)(b).
\textsuperscript{30} Article V(1)(c).
\textsuperscript{31} Article V(1)(d).
it can be enforced even if it has not been declared enforceable. In consonance with the Convention, courts tend to refuse awards that have been set aside in their countries of origin. In the French case of Berardi v Clair a French court refused to recognise an award that was made and then set aside in Geneva. The Court was of the opinion that it was obliged to refuse enforcement under article V(1)(e) of the Convention. Paulsson criticises this reasoning. According to him refusal under article V(1)(e) is not mandatory but discretionary. Indeed, the relevant provision reads: "Recognition and enforcement of the award may be refused..." It is a widely accepted rule of interpretation that the word "may" is not mandatory but discretionary. However, Schwartz emphasises that this interpretation may only be possible in respect of the English text of the Convention. He refers to article V(1)(e) of the French text which provides that "enforcement will not be refused...unless..." This provision throws a different light on the article, and reveals a disturbing situation whereby international conventions can have different meanings depending on the language used.

Some courts have enforced awards set aside in their state of origin under the more favourable provisions of their laws. In the French case of Pabalk Ticaret Sirketi Ltd v SA Norsolor, applying article V(1)(e), the Court of Appeal set aside a French enforcement order of an award made in Vienna, since it had been set aside by an Austrian court. However, the Court of Cassation held that the annulment of an award in the state of origin or under the law which it was made, does not affect recognition if the law of the state where enforcement is sought allows recognition of such award. Also, in the Chromalloy case, the US District Court enforced an Egyptian award that had been set aside by the Cairo Court of Appeal.

In the Chromalloy case, in confirming enforcement, the Court laid emphasis on article VII of the Convention which provides that the Convention shall not deprive a party of any right which he may avail to himself under the law of the country where

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34 Ibid.
35 Emphasis mine.
36 See Schwartz "A comment on Chromalloy" 1997 14 *Journal of International Arbitration* 125 at 133.
37 Court of Cassation October 19 1984.
enforcement is sought. In a French decision,\textsuperscript{39} the Court in upholding an award that had been annulled in Switzerland, stated that since the annulment of an award in its country of origin is not a ground for refusal of enforcement in France, a party was entitled to redress under the more favourable provisions of French law. The Court permitted enforcement in reliance on article VII.\textsuperscript{40}

One may say that the result of \textit{Chromalloy} and \textit{Norsolor} is that article VII can have an overriding effect on article V. This means that parties have to contemplate the provisions of the Convention as well as the domestic laws of the place of enforcement. This leads to a two-tier system which in turn results in uncertainty. Also, states whose laws do not recognise annulment as a ground for refusing enforcement, are permitted to disregard article V(1)(e) (by the “back door”) without even entering a reservation to the effect that it will not be bound by it.

The fact that a court can enforce an award that has been set aside or suspended in its state of origin implies that the enforcing court accepts that the arbitration falls outside the legal system of its state of origin.\textsuperscript{41} Alternatively, it implies that the legal order of the state of origin is irrelevant. But the Convention implies the contrary. It states that when an application to set aside or suspend an award has been made in the state of origin, the court in which enforcement is sought may, if it considers it proper, adjourn the decision on the enforcement of the award.\textsuperscript{42} This provision if nothing, gives deference to the legal order of the state where the award is made. One would have thought that on the basis of reciprocity the courts of one country would consider the decision of another without necessarily being bound by it. The court of the enforcing state should enquire into the reasons for the setting aside of the award. Therefore, though the fact that the award has been set aside in its state of origin will not necessarily bind the court in the enforcing state, the enforcing court should enquire whether the award is liable to be set aside under its laws for similar reasons that it was set aside in the country of origin. If the answer is in the affirmative, it should decline enforcement.

\textsuperscript{39} \textit{Hilmarton C/O TV} 12 Mealey’s International Arbitration Report April 1997.
\textsuperscript{40} Schwartz \textit{Ibid} 127.
\textsuperscript{41} Indeed the Court in \textit{Hilmarton} mentioned that since the award made in Switzerland was an international award, it was not integrated into the Swiss legal order and was therefore capable of enforcement despite its annulment in Switzerland.
\textsuperscript{42} Article VI.
4.2.3.5.2 *Refusal at the instance of the court*

The court of the place where recognition and enforcement are sought may on its own motion decline to recognise or enforce the award. It may do so if the subject matter is not capable of arbitration under its laws, or if recognition or enforcement will be contrary to its public policy.\(^{43}\)

4.2.3.6 *Benefits of the New York Convention*

The New York Convention creates more favourable conditions for the enforcement of awards than the Geneva Convention. It bestows on foreign awards the same status as domestic awards.\(^{44}\) It obliges each contracting state to recognise arbitral awards as binding. States should not impose more onerous conditions or higher fees or charges on foreign awards as against domestic awards.\(^{45}\) The Convention further simplifies the documentary requirements regarding recognition and enforcement of awards. The documents required for the enforcement of awards are the original of the award and the arbitration agreement or certified copies.\(^{46}\)

Articles V and VI of the New York Convention provide a more systematic arrangement and seeks to avoid some of the problems of the Geneva Convention.\(^{47}\) Whereas in terms of the Geneva Convention, the Plaintiff had the onus to prove that the conditions for enforcement had been fulfilled, the New York Convention shifts this burden and requires the defendant to show cause why the award should not be enforced.\(^{48}\) The Geneva Convention's requirement that an award should not be contrary to the principles of law of the country in which the arbitration had taken place is problematic. In terms of the Geneva Convention,\(^{49}\) a court could refuse enforcement of an award for reasons other than those specified in the Convention. It is therefore possible to attack the award not only for failure to comply with the conditions prescribed in the Convention but also for not being in conformity with the laws of the place of arbitration.\(^{50}\) Under the New York Convention however, the

\(^{43}\) Article V(2).
\(^{44}\) Lew *Contemporary Problems in International Arbitration* (1986) 344.
\(^{45}\) Artiele III.
\(^{46}\) Article IV.
\(^{47}\) Contini *Ibid* 299.
\(^{48}\) Ibid.
\(^{49}\) Article III.
\(^{50}\) Contini *Ibid*. 

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courts on the face of it may only refuse enforcement in terms of the Convention itself.\textsuperscript{51}

4.3 Regional conventions
4.3.1 The Inter-American Convention
4.3.1.1 Background to arbitration in Latin America

Historically, Latin America has been hostile to arbitration.\textsuperscript{52} Latin American states are known to have kept arbitration under strict curial supervision and hesitant to enforce international awards.\textsuperscript{53} Also, several Latin American states did not recognise agreements providing for arbitration in respect of future disputes.\textsuperscript{54} Another document known as a submission was necessary.\textsuperscript{55} In consequence, a party to arbitration could refuse to conclude a submission when a dispute arose and choose litigation instead. Parties to arbitration agreements therefore had no guarantees that their agreements would be enforceable. However, in recent times, reforms have been implemented towards more favourable arbitration conditions such as limited curial intervention and party autonomy.\textsuperscript{56}

4.3.1.2 Enforceability of the arbitration agreement

It is important that there are legal safeguards to ensure that arbitration agreements are irrevocable. Otherwise, a party who has agreed to arbitrate can refuse to do so and even choose to litigate instead.\textsuperscript{57} The Inter-American Convention on International Commercial Arbitration 1975 recognises the validity of arbitration clauses.\textsuperscript{58} Article 1 of the Convention provides that “an agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction is valid.” When juxtaposed with the New York Convention it becomes apparent that the Inter-American Convention “lacks the

\textsuperscript{51} Article V.
\textsuperscript{53} Jackson Ibid.
\textsuperscript{54} Ibid 93.
\textsuperscript{55} Norberg “United States Implements Inter-American Convention on Commercial Arbitration” 1990 45 Arbitration Journal 23.
\textsuperscript{56} Mantilla-Serrano “Major Trends in International Commercial Arbitration in Latin America” 2000 17 Journal of International Arbitration 139 at 142.
\textsuperscript{58} Mantilla-Serrano Ibid 140.
force and precision of enforcement used in the New York Convention.” It merely states that arbitration agreements are valid. It also fails to provide for referral to arbitration by national courts where litigation is pending, in the event of a prior agreement to arbitrate. It has been said that this is a reflection of Latin America’s disfavour of its citizens entering into binding arbitration agreements with entities from developed states. One can therefore say that parties whose agreements are governed by the New York Convention are better placed to enforce them.

4.3.1.3 Recognition and enforcement of the award

The Inter-American Convention adopted the New York Convention’s provision on enforcement almost verbatim. Like the New York Convention, it limits the grounds upon which a party may resist an award. Also, the burden is on the party resisting the award to establish the grounds for refusal. Again, the provision relating to the recognition of awards appears weaker and less direct than its New York Convention counterpart. Rather than giving an award a binding effect, it provides that “an arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judgment.” In my opinion this provision raises doubts as to the finality of awards. The possibility also arises that a contention that an award is appealable is an additional ground for refusing enforcement. This provision can be used as an escape route to sidetrack the specifically defined instances whereby an award can be refused as provided by article 5.

4.3.2. The European Convention on International Commercial Arbitration

4.3.2.1 Scope and application

The European Convention on International Commercial Arbitration of 1961 was drafted under the auspices of the Economic Commission for Europe of the United Nations. The aim of the Convention is to promote European trade by removing obstacles that impede the organisation and operation of international commercial arbitration in Europe. The Convention applies to agreements concluded between physical or legal persons having when concluding their agreement, their habitual

59 Jackson Ibid 96.
60 Ibid.
61 Ibid.
62 Nattier Ibid.
63 Article 5.
64 Article 4.
place of residence or seat in different contracting states. While it limits the right of state parties to refuse recognition and enforcement of awards, it does not prevent them from applying more favourable conditions to the enforcement process.

4.3.2.2 The interrelationship of the powers of the parties, arbitrators and state laws

The Convention is founded on the principle of freedom to contract and the right of parties to determine the terms of their contract. One can also say that it maintains an amazing balance between party autonomy and curial intervention. It gives autonomy to the arbitrators and parties while maintaining a level of judicial control. The Convention expressly gives the parties the freedom to submit to a permanent arbitration institution or ad hoc proceedings, to determine the place of arbitration and to select the procedure. The parties are also free to determine the law to be applied to the substance of the dispute. If the parties fail to select the applicable law, the arbitrators may apply the proper law under the conflict of laws. Whether applying the law selected by the parties or the proper law under the conflict of laws, the arbitrators should take into account the terms of the contract and trade usages. The application of trade usages are also useful in that international arbitrators rely on them in interpreting ambiguous or vague contractual terms as well as for filling gaps in the contract. The arbitrators also act as amiables compositeurs if the parties so decide and if the applicable law so permits.

The arbitrators are empowered to determine objections to their jurisdiction. In terms of the Convention, matters relating to the arbitrators’ jurisdiction and the validity of the arbitration agreement may be raised at the arbitration proceedings and not the enforcement proceedings. An objection to the jurisdiction which is based on the fact that the arbitral agreement is non-existent or null and void should be raised not later than delivery of the statement of claim or defence of the party raising such

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65 Article I(1) of the European Convention.
68 Article IV.
69 Article VII(1).
71 Article V.
An objection based on the fact that an arbitrator has exceeded his terms of reference should be made during the arbitral proceedings as soon as the arbitrator acts in excess of his powers. Where there is a delay in making the objection, the arbitrator has a discretion to permit the objection to be made if he considers that the reason for the delay was justified. This enhances party autonomy as well as the independence of the arbitrators. However, the exercise of such powers is subject to judicial control of the lex fori. For example, the arbitrator’s decision on whether the delay in raising an objection to its jurisdiction was justifiable is subject to judicial review. In essence, though the arbitrators are given more powers, the Convention ensures that they are exercised within the law. This limits the abuse of power by arbitrators. Though the Convention is conducive for international arbitration, it contains no provision committing contracting states to enforce such awards.

5. RECOGNITION AND ENFORCEMENT IN DOMESTIC LAW

5.1 South Africa

5.1.1 General introduction

In South Africa, arbitration is governed by two principal legislations namely the Arbitration Act of 1965 and the Recognition and Enforcement of Foreign Arbitral Awards Act of 1977. The 1965 Act deals with matters such as the appointment of arbitrators and umpires, the powers of arbitrators, the powers of the courts in relation to the arbitration, the enforcement of arbitral awards and the setting aside of awards. Notwithstanding these legislative provisions, common law is still applicable. The 1965 Act merely provides for the facilitation of arbitration.

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72 Article VI.
73 Ibid.
74 Article V(2).
75 Section 12 of the Act.
76 Section 14.
77 Section 21.
78 Section 31.
79 Section 33.
proceedings and provides a better and more efficient means for the enforcement of an arbitral award.\textsuperscript{80} Common law remains applicable to oral arbitration agreements and written agreements that expressly exclude the provisions of the Arbitration Act.

A criticism against the legal regime governing arbitration in South Africa is that the courts have too many regulatory powers over arbitral tribunals. In addition to its several statutory powers,\textsuperscript{81} the courts have common law powers\textsuperscript{82} to determine the validity of arbitral proceedings while they are in progress and grant an interdict halting proceedings until such validity is determined.\textsuperscript{83} It also has similar powers to interfere with procedural rulings of arbitrators while arbitration proceedings are in progress.\textsuperscript{84} In addition, the arbitration tribunal may on the application of a party or upon a court order, state any question of law for the opinion of the court.\textsuperscript{85} Such opinion is binding on the tribunal and the parties.\textsuperscript{86} The result is that the independence of arbitration tribunals is eroded and proceedings may be unnecessarily delayed.

5.1.2 Recognition and enforcement of awards

The South African legal frame work does not adequately cater for the recognition and enforcement of international awards. The Recognition and Enforcement of Foreign Arbitral Awards Act of 1977 governs the enforcement of foreign awards. The Act defines a foreign award as an award made outside the Republic\textsuperscript{87} or one in respect of which enforcement is not permissible in terms of the 1965 Act, but which is not in conflict with its own provisions.\textsuperscript{88} This leads to the conclusion that foreign awards are only enforceable in South Africa if they were made pursuant to a written arbitration agreement. A foreign award made pursuant to an oral agreement will not be enforceable in terms of the 1965 and 1977 Acts since they both relate to written arbitral agreements. If the application of common law is not extended to awards made pursuant to foreign oral agreements, such awards may find themselves unenforceable in South Africa. But South Africa is not alone in this regard. It can be said that it is

\textsuperscript{80} Nkhe v Kindi 1912 CPD 529 at 532.
\textsuperscript{81} See section 21 of the Arbitration Act.
\textsuperscript{82} Butler "South African Arbitration Legislation – The Need for Reform" 1994 27 CILSA 118 at 124.
\textsuperscript{83} Inter – Continental Finance and Leasing Corporation (Pty) Ltd v Stands 56 and 57 Industries Ltd 1979 (SA) 740 (w) 752 H – 754 (C).
\textsuperscript{84} Tuesday Industries (Pty) Ltd v Condor Industries (Pty) Ltd 1978 4 (SA) 379.
\textsuperscript{85} Section 20(1) of the Arbitration Act.
\textsuperscript{86} Section 20(2).
\textsuperscript{87} Section 1(a).
\textsuperscript{88} Section 1(b).
generally difficult to enforce awards resulting from oral arbitral agreements in several countries since national legislations and conventions demand that the agreement and award be produced in writing as a prerequisite for enforcement.

Turley argues that the 1977 Act is faulty since it provides for enforcement and not recognition, recognition being a pre-condition for enforcement.\textsuperscript{89} However recognition proceedings are not usually conducted without enforcement also being requested, and the enforcement of an award by a court implies that it recognises the award without necessarily stating so.

The South African legal framework fails to cater for international arbitration. The 1965 Act that governs arbitration proceedings within South Africa does not distinguish between municipal and international arbitration.\textsuperscript{90} The Recognition and Enforcement of Foreign Arbitral Awards Act of 1977 that gives effect to the New York Convention \textsuperscript{91} does not make provision for international awards made in states that are not parties to the Convention.\textsuperscript{92} The result is that the 1965 Act governs the enforcement of international awards made in such states. However, this Act is clearly tailored for domestic purposes and falls short of the demands of international arbitration.

5.1.3 \textit{Recent developments in South Africa}

The South African Law Commission has proposed changes to the arbitration laws and a Draft Bill has been completed.\textsuperscript{93} The Law Commission proposes the adoption of the UNCITRAL Model Law for international arbitration, and the repeal and replacement of the existing Arbitration Act of 1965 with a comprehensive new statute for domestic arbitration.\textsuperscript{94} The Law Commission further recommends a reform of the provisions of the 1977 Act relating to the adoption of the New York Convention, and that the ICSID Convention\textsuperscript{95} be adopted.

\textsuperscript{89} Turley "The Proposed Rationalisation of South African Arbitration Law"\textit{1999 TSAR 235 at 252.}
\textsuperscript{90} \textit{Ibid} at 240.
\textsuperscript{91} Schulze "Recognition of Foreign Arbitration Award – Seton Co v Silveroak Industries Ltd" \textit{2000 De Rebus 41 at 42.}
\textsuperscript{92} \textit{Butler} \textit{Ibid} 130.
\textsuperscript{93} See Steyn "Arbitration-Bringing South Africa in from the Cold" \textit{1997 De Rebus} 197 at 198.
\textsuperscript{94} Website of University of Witwatersand – \texttt{http://www.serverlaw.wits.ac.za} 2.
\textsuperscript{95} The Washington Convention on the Settlement of International Investment Disputes Between States and Nationals of Other States of 1965.
5.1.4 The Draft Bill and the significance of the Model Law

5.1.4.1 The Draft Bill

The Model Law is incorporated by schedule 1 of the Draft Bill with minor changes. The Law Commission is of the opinion that the Model Law should be adopted with as little modification as possible to maintain uniformity with other countries that have adopted it. The incorporation of the Model Law, the New York Convention and the ICSID Convention by the Draft Bill provides a comprehensive framework for the regulation and enforcement of international and foreign awards in South Africa. It also makes the law easily accessible, avoiding a situation whereby different legislations in relation to the same subject-matter are scattered about. The significance of the adoption of the Model Law cannot be overstated. First of all, it is beyond doubt that the 1965 legislation does not favour modern trends with regard to the enforcement of international awards. Further, the scope and application of the New York Convention is limited. The Model Law on the other hand, represents a recipe for a modern arbitration legislation.

5.1.4.2 The Model Law

The United Nations Commission on International Trade Law (UNCITRAL) was set up in 1966 to promote harmonisation in international trade. In 1985 UNCITRAL produced a Model Law with the aim of creating uniform rules for the regulation and enforcement of international commercial arbitration. The Model law is a sort of blue print legislation which it is hoped, if adopted by states will unify national arbitration laws. This will result in the removal of differences in national laws relating to the enforcement of international awards, as well as obstacles caused by varying interpretations given to conventions by domestic courts. Ideally, if all states were to adopt the Model Law, international awards would gradually receive uniform treatment everywhere.

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97 Schedule 3 of the Draft Bill.
98 Schedule 4 Ibid.
100 Ibid.
101 Ibid 719.
In terms of the Model Law, an arbitration is international if the parties at the conclusion of their agreement have their places of business in different states or if the place of arbitration is outside the state where the parties have their places of business. An arbitration is also international if the place where a substantial part of the obligation is to be performed or the place with which the subject matter of the dispute is most closely connected is situated outside the state where the parties have their places of business. The Model Law further provides that an arbitration is international if the parties have expressly agreed that the subject matter of the arbitration relates to more than one country.\textsuperscript{102} As has been stated before, the second footnote to article 1, which is non-binding, suggests a wide interpretation of the term “commercial” and gives an illustrative list of relationships that may be considered commercial.

5.1.4.2.1 \textit{Important characteristics of the Model Law}

Two important features of the Model Law are the restriction of curial intervention in arbitral proceedings and party autonomy.\textsuperscript{103} The Model Law aims to liberalise international arbitration by limiting the role of national courts while increasing the powers of the parties to determine how their disputes are determined.\textsuperscript{104} Article 5 provides that “In matters governed by this law, no court shall intervene except where so provided in this law.” By this provision, court intervention is limited to specific instances provided by the Law, thereby cutting out any residual jurisdiction to intervene.\textsuperscript{105} It is submitted that this provision will prevent the courts from using their common law powers to intervene in arbitral proceedings in respect of matters in which they have no statutory powers to do so. The effect of article 5 is not that court intervention is eliminated. It is merely put in check.\textsuperscript{106} Indeed, there are certain instances where court assistance is desirable to make arbitration proceedings effective. The Model Law allows courts to be involved in matters such as the appointment of arbitrators where the parties fail to do so,\textsuperscript{107} challenges to arbitrators,\textsuperscript{108} controversies relating to the termination of an arbitrator’s mandate,\textsuperscript{109}

\textsuperscript{102} Article I(3)(c).
\textsuperscript{103} Party autonomy is discussed later in this chapter at paragraph 6.2.1.
\textsuperscript{105} \textit{Ibid} 363.
\textsuperscript{106} Coutsoudis “International Arbitration Law in South Africa-An Introduction to the UNCITRAL Model Law” From the website of B. Coutsoudis and Associates \url{http://law-online.co.za}.
\textsuperscript{107} Article 11.
\textsuperscript{108} Article 13.
\textsuperscript{109} Article 14.
the jurisdiction of the tribunal, setting aside of awards or enforcement of awards. In all these circumstances except in respect of setting aside and recognition and enforcement proceedings, the parties may refer the matter to some other competent authority specified in the law other than a court. This alternate authority can be catered for by individual states when adopting the Model Law. Thus the parties are still able to keep judicial involvement to a minimum. The importance of article 5 is that it informs the parties in advance of the specific instances in which the court will intervene. In my view, arbitration depends on the judiciary to some extent, particularly in the realm of enforcement. It is submitted however that court intervention should be kept to a minimum and should concern only matters relating to fair hearing and the due process of law.

The Model Law functions on the principle that even when the court is approached on issues relating to arbitration, this should not delay the arbitral proceedings. In other words the arbitral proceedings should continue notwithstanding the court application. In fact, arbitration may continue to finality even where an application has been made to a court challenging its jurisdiction.

The Model Law like the New York Convention requires that an arbitral agreement should be in writing. The Model Law expands on the Convention’s definition of “writing.” According to the Convention, an agreement in writing is an arbitration clause in a contract or a separate arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. The Model Law has a similar definition but expands it to include telex or any other means of telecommunication which provides a record of the agreement. This includes any reference to an agreement in the parties’ statement of claim or defence which is not denied by the other side. Also, reference in a written contract to an arbitration clause is sufficient if the reference is such, so as to make the clause part of the contract. Since the use of

110 Article 16.
111 Article 34.
113 Article 6.
114 Explanatory Note Ibid 20.
115 See articles 8(2), 9, 13(3) and 16(3).
116 Article II(1).
117 Article 7(2).
electronic mail is now common, countries might want to insert a provision relating to
the use of electronic mail and clarify at what stage it will be said to “provide a record
of the agreement.” The question is; does electronic mail provide such record if it is
saved on software, and sent from one party to the other? Or should it necessarily be
printed? In other words, at what stage should the agreement be regarded as a written
document? It seems that electronic mail will provide a record of the agreement even if
it is saved on a software and not printed. What is important is that the party relying
on the agreement should be able to show that the other party received the agreement
and agreed to its contents.

The Model Law also makes arbitrators more effective by giving them some
autonomy. In other words the arbitrators are able to determine some matters which
were hitherto reserved for courts. For example as has been said, it empowers the
tribunal to rule on its own jurisdiction and the validity of the arbitration agreement,118
and to make interim measures of protection.119 These provisions are strengthened in
the South African context since the Draft Bill makes such orders enforceable like
awards. It also enables tribunals to order security for costs, interest and costs. The
parties to the dispute also have some level of autonomy in terms of the Model Law.
For example they are able to select the applicable laws. Subject to some mandatory
provisions, they may select the procedure and the law applicable to the substance of
the dispute.120 The arbitrators may select the applicable law should the parties fail to
do so. The ability of the parties to select the rules of procedure is important in
international arbitration as this enables the parties to shape the procedure to meet their
specific needs and to avoid the peculiarities of domestic laws, including domestic
rules of evidence which might be an impediment to international arbitration.121 The
parties may also determine the number of arbitrators,122 the place of the arbitration123
and the language to be used.124

5.1.4.2.2 Enforcement of the award

118 Article 16.
119 Article 17.
120 Articles 19 and 28.
121 “Explanatory Note Ibid 23.
122 Article 10. See Mosito “The UNCITRAL Model Law on International Commercial Arbitration and
123 Article 20.
124 Article 22.
Article 35(1) of the Model Law provides that an arbitral award shall be recognised as binding and upon application in writing to the competent court, shall be enforced subject to the provisions of the present article, and article 36 regardless of where it was made. This creates a framework for the enforcement of international awards in South Africa whether made in the Republic or not.\textsuperscript{125} Article 35(2) is merely procedural and prescribes the documents required in support of an application for enforcement. Like the New York Convention, an authenticated original of the award and arbitration agreement or certified copies must be produced. If these requirements are complied with, it appears that the court should enforce the award, subject to article 36. Article 36 which is similar to article V of the New York Convention, contains a list of grounds upon which enforcement may be refused. Having regard to the provisions of Article 36, one cannot conclude that an award is immediately enforceable in a "UNCITRAL country." It is safe to submit that some compliance with the law of the country where the award was made is a possible requirement for enforcement. Article 36 raises considerations relating to the law of the country where the award was made. In terms of this article, a court can refuse enforcement if the award has not yet become binding on the parties or has been set aside or suspended by a court of the country where it was made or under the law of which it was made.\textsuperscript{126} Refusal can also take place if the principles of fairness and due process are not observed, such as failure to give proper notice of the proceedings to the other party.\textsuperscript{127} The article also ensures that the wishes of the parties are adhered to. For example, an award can be refused if the arbitrators go beyond the scope of the submission\textsuperscript{128} or if the composition of the tribunal or the arbitral procedure is not in accordance with the agreement of the parties.\textsuperscript{129} The article also makes the law of the country where enforcement is sought very relevant. While the burden is on the party resisting the award to raise and prove the grounds discussed above, the court can on its own motion refuse enforcement, if the subject matter of the dispute is not capable of settlement by arbitration under its laws or if recognition or enforcement would be

\begin{footnotesize}
\begin{itemize}
\item Article 35(1) of the Draft Text of the Working Group reads as follows "An arbitral award...[made within or outside the territory of this state] shall be recognized as binding subject to the provisions of Article 36." See UNCITRAL Document A/CN.9/246 English 34.
\item Article 36(1)(a)(v) of the Model Law.
\item Article 36(1)(a)(ii).
\item Article 36(1)(a)(iii).
\item Article 36(1)(a)(iv).
\end{itemize}
\end{footnotesize}
contrary to its public policy. The law and public policy of the place of enforcement are therefore of significant importance for the purposes of enforcement. In sum, while the Model Law makes it possible for international awards to be readily enforceable, it balances this with the need for compliance with the law governing the award, the wishes of the parties, fairness and due process, and the public policy and law of the place of enforcement. One must also state that like the New York Convention, the decision to refuse enforcement is merely discretionary. This means that a party should be able to obtain enforcement even when his opponent has raised one or more of the grounds listed in article 36. It is a fact that the Model Law is important in international arbitration. It will ultimately create uniform standards for the recognition and enforcement of international awards in domestic laws if adopted by a large number of states.

5.1.4.2.3 South Africa's treatment of the Model Law

The Law Commission recommends that the Model Law be adopted with minimum changes to promote harmonisation. For this reason, the Draft Bill provides that the travaux préparatoires relating to the Model Law should be used as an interpretation aid. However, minimal alterations and additions have been made with a view to making its use effective. In this regard, Schedule 1 empowers the arbitrators to award interest and costs unless the parties agree otherwise. These provisions are meant to deter the parties from causing unnecessary delays during proceedings which might result in the payment of accumulated interest and costs. Whereas the Model Law provides for three arbitrators unless the parties agree otherwise, Schedule 1 provides for one arbitrator unless the parties agree otherwise. A reduced number of arbitrators is economical for the parties. Articles 34(5) and 36(3) of Schedule 1 provide clarification of the meaning of public policy, a ground for which an award may be set aside in terms of article 34(2)(b)(ii), or recognition and enforcement refused in terms of article 36(1)(b)(ii). In this regard an award is in conflict with the

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130 Article 36(1)(b).
132 Ibid 4. See also section 8 of the Draft Bill.
133 Article 31(5) of Schedule 1.
134 Article 31(6) Ibid.
136 Compare articles 10(2) of the Model Law and Schedule 1.
public policy of South Africa if the tribunal breached a duty to act fairly thereby resulting in substantial injustice, or if the making of the award was induced or affected by fraud or corruption. Also, though a party may apply to set aside an award not later than three months after it was received, if the award is tainted with fraud the three months period commences when the fraud is, or ought to have been discovered.\textsuperscript{137}

The Draft Bill provides for conciliation in order to encourage the parties to consider conciliation as an alternative to arbitration. Also, if the parties agree to arbitrate but subsequently agree to settle their dispute by conciliation, the settlement agreement is enforceable as an arbitral award.\textsuperscript{138} The Draft Bill extends the definition of arbitration in the Model Law to include an arbitration clause contained in or incorporated by reference in a bill of lading. It also includes agreements referring to terms that are in writing.\textsuperscript{139} The Bill further confers immunity on arbitrators and arbitral institutions in respect of any act or omission performed during the course of their duties except such act or omission is done in bad faith.\textsuperscript{140}

5.2 Botswana

5.2.1 Enforcement under the New York Convention

In 1971 Botswana enacted the Regulation and Enforcement of Foreign Arbitral Awards Act.\textsuperscript{141} The Act incorporates parts of the New York Convention into Botswana law. In terms of the Act the Convention is only applicable to awards made in countries that are parties to the Convention, and in relation to matters that are considered as commercial under the laws of Botswana.\textsuperscript{142} Articles II(2) and (3), and III to VI of the Convention have the force of law in Botswana.\textsuperscript{143} The fact that the Act does not specifically incorporate article I of the Convention, leaves one with the impression that awards made in contracting states are not necessarily binding in Botswana. However the Act makes it clear that awards made in countries that are parties to the Convention are binding in Botswana. In terms of the Recognition and Enforcement of Foreign Arbitral Awards Act, an award made in a country that is a

\textsuperscript{137} Articles 34(3) and 34(5)(b) of Schedule 1.

\textsuperscript{138} See sections 11-15 of the Draft Bill.

\textsuperscript{139} Section 2(1) of the Draft Bill.

\textsuperscript{140} Ibid section 9.

\textsuperscript{141} Cap 06:02.

\textsuperscript{142} Section 3.

\textsuperscript{143} Section 4.
party to the New York Convention is enforceable in Botswana "in accordance with and subject to the provisions of the [New York] Convention in such manner as an award may be enforced under the provisions of the Arbitration Act and the laws of Botswana." It is clear from this provision that enforcement is subject to the provisions of the New York Convention. However, the same provision states that enforcement should take place "in such manner as an award may be enforced under the provisions of the Arbitration Act and the laws of Botswana." The Convention also provides that the rules of procedure of the enforcing state and its (the Convention’s) conditions should apply. Therefore, though enforcement is subject to the Convention, the provisions of the Arbitration Act and the laws of Botswana apply. It must be noted however that though the Arbitration Act provides for the enforcement of awards, it does not provide rules of procedure for enforcement, or conditions to be fulfilled by the party seeking enforcement. In practice, parties seeking to enforce foreign awards apply to the High Court by motion, exhibiting copies of the award and arbitral agreement. This practice can be complemented by the New York Convention which provides that a party applying for recognition and enforcement should produce authenticated original or certified copies of the award and arbitration agreement.

In ratifying the Convention, Botswana adopted both reservations. In terms of the first reservation, only matters that are considered commercial under the laws of Botswana are enforceable. Botswana seems to have taken the second reservation further than the Convention requires. In it’s version of the second reservation, enforcement is not only limited to awards emanating from contracting states, but to those states in respect of which awards made in Botswana are enforceable. The manner in which the adopting Act couches the second reservation appears to be too restrictive. It seems that the fact that an award emanates from a state party in compliance with the Convention, does not guarantee enforcement in Botswana. It appears that a party can resist enforcement if he can show that even though the award emanated from a Convention state, a similar award made in Botswana is not enforceable in that state. The relevant

144 Section 3(1) of the Recognition and Enforcement of Foreign Arbitral Awards Act Cap 06:02. The Arbitration Act is Cap 06:01.
145 See section 20 which is reproduced later in this chapter.
146 The uniform view of legal practitioners is that the party applying for enforcement should establish the existence of the award and that it is enforceable.
147 Article IV(1).
provision of the Recognition and Enforcement of Foreign Arbitral Awards Act provides as follows-

"No arbitral award made in any country which is a party to the Convention shall be enforceable in Botswana unless a similar award made in Botswana would be enforceable in such country." 148

Therefore, the fact that the award was made in a Convention state is not enough. It is a requirement that a similar award made in Botswana should be enforceable in the state where the award was made. It goes without saying that this provision is a recipe for confusion. First of all, it does not guarantee the enforcement of awards emanating from all contracting states in Botswana. The enforcement of a New York Convention award in Botswana is conditional upon a similar award made in Botswana being enforceable in the country of origin. Because of the paucity of case law in this area, it is not known what test will be used to determine whether an award made in Botswana is, or will be enforceable in another New York Convention country. In seeking an answer, one might be tempted to look at the practice of the courts of the awarding state. However, the decision of a United States court in the case of Fertilizer Corp of India v IDI Management Inc 149 which ruled against this approach seems in order. In that case, the reservation on reciprocity as well as article XIV of the Convention came up for consideration. Article XIV provides that "a contracting state shall not be entitled to avail itself of the present Convention against other contracting states except to the extent that it is itself bound to apply the Convention." In that case, an Indian corporation sought to enforce an award in a United States court. Both India and the United States adopted the optional reservations when ratifying the Convention. 150 Relying on the reciprocity reservation and article XIV, IDI argued that a similar award from the United States made against an Indian party would be unenforceable in India, as Indian courts usually apply the Convention artificially to avoid enforcement against Indian parties. In rejecting this argument, the Court held in relation to the reciprocity reservation, that what is relevant is that India had signed the Convention, and was making efforts to apply it in good faith. 151 The Court stated clearly that

148 Section 3(3) Cap 06:02.
149 517 F Supp 948 S D Ohio 1981.
151 Fertilizer Corp Ibid 953.
reciprocity does not extend to whether India would actually enforce an award from the United States against its citizens.\textsuperscript{152} As regards article XIV, the Court held that India could avail itself of the Convention to the extent it was bound to apply it and not to the extent it actually did so.\textsuperscript{153} It is submitted that this is the only reasonable interpretation, as investigations as to the disposition of the courts from where the award emanated will be merely speculative. First of all, if one were to look at the practice of the courts, one cannot say with certainty whether or not an award made in Botswana is enforceable in a particular country in the absence of judicial precedent. On the other hand, one cannot conclude from prior judicial refusal that a Botswana award is unenforceable in a particular country. Refusal may have occurred for genuine legal reasons such as non-compliance with the Convention. Also, it is impractical to refer to the practice of courts since there are numerous state parties to the Convention,\textsuperscript{154} in whose courts the enforcement of awards made in Botswana have not been tested.

5.2.2 Enforcement of awards in the absence of conventions

One may ask what rules will govern the enforcement of an international award made in a country that is not a party to the New York Convention. Two possibilities arise. Before discussing them, one must pause a while to state that the Arbitration Act focuses on domestic arbitration, while the Recognition and Enforcement of Foreign Arbitral Awards Act governs only awards made in state parties to the New York Convention. These are the only legislations relating to arbitration, and case law suffers a deficit in this area.

The first possible solution open to a party seeking to enforce an award made in a non-New York Convention state (and in respect of which Botswana has no bilateral agreement in this regard) is to convert the award into a judgment in the state of origin and then seek to enforce it in Botswana as a foreign judgment.\textsuperscript{155} The Judgments (International Enforcement) Act\textsuperscript{156} provides for the enforcement of foreign judgments

\textsuperscript{152} Kennedy \textit{Ibid} 81.
\textsuperscript{153} \textit{Ibid}.
\textsuperscript{154} At least 126 states.
\textsuperscript{155} Kennedy \textit{Ibid} 89.
\textsuperscript{156} Cap 11:04.
in Botswana on a basis of reciprocity. However, because enforcement is based on reciprocity, the same restrictions imposed by the Convention arise.

Secondly, it is my opinion that although the Arbitration Act is essentially conditioned for the regulation and enforcement of domestic awards, there is no indication that it is inapplicable to the enforcement of international awards. It is true that the Act is not conducive for the regulation of international arbitration but this does not make it inapplicable in relation to the enforcement of international awards. In this regard, sections 20 and 21 of the Act are relevant. Section 20 reads-

"An award on a submission may, by leave of the court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award."

Section 21 provides as follows-

"Where the submission does not provide in what place the arbitration shall be held, the arbitrators or umpire may from time to time decide upon such place as may be reasonably accessible to the parties and convenient for the purposes of the reference."

The languages of these sections do not suggest that the contemplated arbitration is restricted to those that have taken place in Botswana or governed by its laws. Section 20 enables a party to obtain enforcement under the Act. If section 21 can be construed to make provision for international arbitration (and I submit that it can), then the resulting award may be enforced under section 20. Of course it might be argued that by the omission of the word "recognition" in section 20, it can be inferred that the intention of the legislature was to confine enforcement to domestic awards, since recognition of awards is not usually an issue in respect of domestic awards. I am of the view however that this argument cannot hold. If one may look at the 1977 Act\(^\text{157}\) of South Africa relating to the enforcement of foreign awards made under the New York Convention, the word "recognition" is omitted. Again, it must be noted that the Arbitration Act of Botswana provides that arbitrators derive their authority from the

\(^{157}\) Recognition and Enforcement of Foreign Arbitral Awards Act of 1977.
submission of the parties. In the interpretation section, "submission" is defined as "a written agreement, wherever made, to submit present or future differences to arbitration, whether an arbitrator is named therein or not." It appears therefore that the Act should be applicable where the agreement to arbitrate was concluded outside Botswana.

If interpreted liberally, the words "place the arbitration shall be held," appearing in section 21 of the Arbitration Act may include a place outside Botswana. This provision gives the parties powers to determine the place of arbitration and in the absence of such determination, the arbitrators may decide. The only restriction in the provision is that the place "should be reasonably accessible to the parties and convenient for the purposes of the reference." It is envisaged that the parties will determine if a "place is reasonably accessible." Therefore if a party in Botswana enters into an arbitration with a party say in South Africa to arbitrate in a non New York Convention state, and the parties are able to attend or be represented at the proceedings, one can say that the place of arbitration was "reasonably accessible." The fact that the Act provides for a "reasonably accessible" venue is an indication that it does not limit itself to awards made in Botswana. Since international arbitration can be conducted anywhere, this supports the view that the ensuing awards should be enforceable in Botswana under the Act. Also the parties may select a particular place for arbitration because it is "convenient for the purposes of the reference." For example the parties may select a venue outside Botswana because most or all of the potential witnesses are based there or because a site to be inspected is stationed there. Again, one must state that there is nothing in the Act barring the enforcement of awards made else where, under its provisions. One can therefore conclude that international awards should be enforceable in terms of the Arbitration Act. It must be clearly emphasised however that it is not canvassed here that the Act is suitable for the regulation of international arbitration. It is certainly not. It is outdated and does not meet the needs of international arbitration. The Model Law has been discussed above and it will be prudent for Botswana to adopt same.

5.3 England

158 Section 3.
159 Section 2.
160 Ibid. Emphasis mine.
In England, arbitration awards are enforceable at common law and by statute. In terms of common law, an action can be instituted based on the arbitration agreement. The party instituting action can obtain judgment on the award. In terms of statute law, part II of the 1950 Arbitration Act governs the recognition and enforcement of arbitration awards made under the Geneva Convention. Part III of the 1996 Arbitration Act makes provision for the recognition and enforcement of New York Convention awards. New York Convention awards are defined as awards made in the territory of a state that is a party to the New York Convention. The 1996 Arbitration Act also applies to both domestic and international awards. The 1996 Arbitration Act provides that an award is final and binding on both the parties and on any person claiming through or under them. The award is therefore immediately enforceable, subject to the agreement of the parties and the right of the losing party to challenge it. In terms of section 66(1) of the Act, an award may be enforced by leave of the court, in the same manner as a judgment. This provision applies whether or not the seat of arbitration is within or outside England. Where leave is given to enforce the award, it may be entered or registered as a judgment. The advantage of entering an award as a judgment is that it can be enforced outside England as a foreign judgment. The 1996 legislation also gives the parties a right of appeal to a court on a question of law arising from an award. However, the parties are at liberty to exclude their right of appeal by agreement. This provision therefore gives the parties an opportunity to decide whether they want the courts to be involved. It is not unduly interventionist and the courts will not interrupt proceedings. The appeal will be made only after the award is rendered. The purpose of the provision is to protect the rights of the parties, and to ensure that awards are not made that are manifestly

162 Section 100(1) of the 1996 Arbitration Act.
164 Section 58.
166 Section 2 of the Arbitration Act of 1996.
167 Section 66(2).
169 Section 69.
170 The right of limited right of appeal on a question of law was first introduced by the 1979 Arbitration Act. It was held in the case of Pioneer Shipping Ltd v BTP Teioxide Ltd (The Nemo) 1982 AC 724 that this right should be interpreted restrictively.
wrong.\textsuperscript{171} Though it is a judicial safeguard, one cannot rule out the fact that it is open to abuse.

5.4 France

French legislation provides for general party autonomy regarding the selection of the arbitral procedure\textsuperscript{172} and the substantive law.\textsuperscript{173} Where the parties fail to agree on the applicable rules of law, the tribunal may take into account the relevant trade usages and apply what rules of law it deems proper.\textsuperscript{174} This has been interpreted to include the international \textit{lex mercatoria}. In effect, arbitrators are able to apply transnational commercial norms that are completely divorced from national laws. This makes France a liberal venue for the purposes of arbitration.\textsuperscript{175}

Under French law, international arbitral awards are recognised if the party seeking recognition proves the existence of the award and if recognition will not be manifestly contrary to international public policy.\textsuperscript{176} The New French Civil Code,\textsuperscript{177} which relates to international arbitration, was enacted to relieve anxiety at the “hands off” approach of French courts in relation to international awards made in France. French courts refused to exercise judicial control over international arbitration proceedings that were not subjected to French law.\textsuperscript{178} It was argued that this \textit{laissez faire} approach caused problems for parties seeking to enforce international awards made in France abroad. Foreign courts hesitated to enforce such awards as they were completely free of any legal safeguards.\textsuperscript{179} The New Civil Code therefore attempts to balance the arbitrators’ powers with judicial safeguards.\textsuperscript{180} It provides that a party may appeal to the Court of Appeal against a decision granting recognition or enforcement of an award if (1) the award was made in the absence of an arbitration agreement or on the

\begin{footnotesize}
\textsuperscript{171} See section 69(3).
\textsuperscript{172} Article 1494 of the New Code on Civil Procedure.
\textsuperscript{173} Article 1496.
\textsuperscript{175} Lando \textit{ibid} 129.
\textsuperscript{176} Article 1498 of the New Code of Civil Procedure.
\textsuperscript{177} 12 March 1981.
\end{footnotesize}
basis of a void or expired agreement (2) if the arbitral tribunal was irregularly composed (3) if the arbitrator decided in a manner incompatible with the mission conferred on him (4) if the due process was not observed (5) if recognition and enforcement would be contrary to international public policy. The New Civil Code makes it possible for international awards made in France to be set-aside in certain defined circumstances. International awards emanating from France therefore cease to be "unruly horses" and are subjected to legal and judicial safeguards.

6. ARBITRATION AND THE LEGAL FRAMEWORK OF THE EUROPEAN UNION

6.1 Generally

Though several European Union countries have legislations that are conducive to international arbitration, the European Union has played a low-key role in this regard. In fact, none of the international accords governing the validity of arbitral awards in Europe is functionally derived from the European Union. The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968 and the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1988 expressly exclude arbitration from their scope of application.

Western European national legislations have moved towards party autonomy, this being regarded as fundamental for international arbitration. The delocalisation debate whereby the parties are able to sever the procedural and substantive laws of the arbitration from domestic laws is strong in Europe. By being able to select the laws governing the arbitration, the parties are able to assess their legal position and the risks facing them in advance.

6.2 Party autonomy and delocalisation

6.2.1 Party autonomy

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181 Article 1502 New Civil Code.
182 See Ibid.
183 Theoifrastous Ibid 484.
184 See article 1(4) of both Conventions.
185 Theoifrastous Ibid 465.
International commercial arbitration is affected by several dimensions. It usually concerns several countries since the place(s) of domicile of the parties, the place(s) where the contract is to be performed and the place of the arbitration may all be different. The result is that the arbitrators may be confronted by several legal systems. The question then arises which legal system governs the arbitration. In the absence of any indication from the parties, it may be argued that the law of the place with the closest links to the contract applies to the substance of the dispute, while the law of the place of arbitration governs the procedure. But the situation is not as simple as this and several complex issues may arise. These are issues the parties do not foresee when making their contract.\textsuperscript{186} In order to overcome these problems, the parties sometimes prefer to select the applicable law.

Party autonomy reflects the desire of the parties to a contract to determine the arbitral process.\textsuperscript{187} In so doing, they may wish to select the applicable laws and determine the number of arbitrators rather than have these issues determined by national laws. By selecting the applicable laws, the parties are able to avoid the uncertainties created by conflict-of-laws problems.\textsuperscript{188} In selecting the applicable law the parties may empower the tribunal to act \textit{ex aequo et bono} or as \textit{amicable compositeur}.\textsuperscript{189} In other words, the tribunals may apply principles of fairness or equity they consider necessary for the settlement of the dispute. Parties also increasingly seek to delocalise their contract.

\textbf{6.2.2 Party autonomy and public policy}

Party autonomy has an uneasy relationship with public policy. It cannot be denied that parties to international arbitration act within the framework of states. In the words of Perloff, “A contractual relationship involves a dynamic interplay between the interests of two distinct legal orders, the internal order created by the contract itself and the external order from which the contract derives its legal effect and legitimacy.”\textsuperscript{190} There are certain fundamental rules of legal systems from which the parties may not deviate.\textsuperscript{191} Therefore the liberty which we may say the parties derive from the concept


\textsuperscript{188} \textit{Ibid} 327.

\textsuperscript{189} \textit{Ibid}.

\textsuperscript{190} \textit{Ibid}.

\textsuperscript{191} \textit{Ibid} 328.
of party autonomy is subject to the public policy of the state were the arbitral proceedings are held and the place of enforcement. The New York Convention lays down certain grounds upon which an award may be reviewed. 192 According to Perloff, these grounds are based on notions of public policy. 193 In addition to these grounds the Convention further provides that a court may refuse recognition and enforcement of an award that is contrary to its public policy. 194 This "general public policy" clause appears to give the courts unlimited powers to interfere with arbitral awards on the grounds of public policy. It is important to mention also that international arbitration should comply with international public policy.

6.2.3 Delocalisation

When talking about party autonomy the issue of delocalisation becomes relevant. The question that arises is to what extent the parties should be permitted to remove their contract from the confines of domestic laws. Some scholars advocate complete severance whereas others argue that complete detachment is not permissible. Paulsson aptly summarised the situation when he wrote, "To seek completely to avoid national jurisdictions would be misguided.... The question is whether in certain situations international arbitration may be liberated from the local peculiarities of a place of arbitration chosen either fortuitously or for reasons of neutrality having nothing to do with the parties' attachment to local rules of arbitration." 195 In my opinion, whereas severing arbitration from legal systems conforms to the realities of international commercial relations, the parties cannot oust the mandatory laws of the place of arbitration and public policy considerations of the place of enforcement. Complete severance from domestic laws will amount to asking too much from states. One cannot seek to completely sever arbitration from states and then turn around to seek their assistance for enforcement. The enforcement of an award in a state affects the legal order of that state. The legal rights and duties of the party against whom enforcement is sought are affected. Enforcement may affect his legal capacity and this in turn affects the legal order of the state where he resides. For example, he may become bankrupt as a result of the enforcement. This has certain legal consequences on the legal order of the state. In the first place, the legal consequences of the

192 Article V.
193 Perloff Ibid 332.
194 Ibid. See article V(2)(b) of the Convention.
195 Paulsson Ibid.
bankrupt party will be determined by the laws of the state of his place of residence. Also, depending on his size and economic strength, the economic and social effects of his bankruptcy may have telling effects on the state. If for example the party is a large company with several employees, and enforcement results in liquidation, this will affect state revenue as in loss of tax. The party may have to lay off workers, and the loss of several jobs has social consequences. Therefore, states have an interest in ensuring that minimum legal standards are met as the consequences of enforcement can affect their legal, social and economic order, no matter how minute.

6.3 Recognition and enforcement of awards within the legal structure of the European Union

The enforcement of awards in the European Union might very well encounter problems with EU law. This results from a hesitation of the European legal framework to embrace arbitration. Article 177 of the Treaty of Rome creates a situation whereby national courts or tribunals may refer questions of EU law to the European Court of Justice for preliminary ruling. The Court of Justice in the case of Vaassen v Management of the Beambtenfonds Voor Het Mijnbedrijf\textsuperscript{196} accepted a reference submitted by a Dutch tribunal, which was constituted under Dutch law, in terms of article 177. However, in the case of Nordsee Deutsche Hochsee Fischerei GmbH v Reederei Mond Hochsee Fischerei AG & Co KG,\textsuperscript{197} in relation to an arbitration constituted under a ship building contract, the Court of Justice stated that since commercial arbitrators derive their jurisdiction from the arbitration agreement rather than the law of the country where the award was made, they cannot be regarded as tribunals for the purposes of article 177. The English courts\textsuperscript{198} have decided that references can be made to the Court of Justice on a point of EU law through national courts. The situation whereby points of law can only be referred to the Court of Justice through national courts is tedious.\textsuperscript{199} Though arbitrators cannot approach the Court of Justice directly, on questions of EU law and policy, they are bound by

\textsuperscript{196} Case 61/65 1966 ECR 261.
\textsuperscript{198} *Bulk Oil (Zug) Ltd v Sun International Ltd* 1984 1 WLR 147; 1984 1 All ER 386. The arbitrator had decided that the export of U.K. crude oil to Israel was contrary to government policy. The losing party contended that this policy violated EC (EU) law. The Court consented to refer the matter to the ECJ. It must be noted that the matter was not directly referred to the ECJ by the arbitral tribunal but by the Court.
\textsuperscript{199} Hill *Ibid.*
them. 200 This creates a situation whereby a duty exists without a right. A direct access to the Court of Justice will no doubt reduce unnecessary delays.

In terms of the Treaty of Rome, EU law should be applied uniformly throughout the territories of member states. 201 Where national legislations conflict with EU law, EU law prevails. 202 Arbitrators therefore should not give effect to contracts that are void under EU law. In addition, since EU law is part of national law, an award may not be enforced in a member state if it conflicts with EU public policy. 203 Therefore, a party seeking enforcement in an EU member state has to contend with both the public policy of the country where enforcement is sought as well as EU public policy. EU policy might also restrict party autonomy as provided by national laws. This can make the EU unattractive for arbitration after all. It seems therefore that arbitrators are left with no alternative but to keep EU policies and laws in their contemplation where the EU is a possible place of enforcement.

7. ENFORCEMENT OF AWARDS AGAINST STATES AND THE ROLE OF THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

7.1 General

The enforcement of awards against states is sometimes difficult since states can raise the defence of sovereign immunity. Foreign investors are usually concerned whether states will submit to arbitration and if they will resist enforcement should an award be made against them. To overcome this problem, the World Bank in 1965 sponsored the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. 204 Its purpose is to encourage private foreign investment in developing countries, 205 by enabling foreign investors and governments of developing countries to settle their disputes in an independent, neutral and non-statual forum. Thus, the Convention established the International Centre for the Settlement of

200 Theofrastous Ibid 488.
201 Hill Ibid 494.
202 See the case of Data Delecta Aktiebolag v MSL Dynamics Ltd 1996 ECR I-4661 where the ECJ held that since the EC Treaty precludes a member state from requiring a person from another member state to provide security, a provision of Swedish law requiring security to be furnished by foreign plaintiffs was contrary to EU law.
203 Ibid.
205 Ibid.
Investment Disputes (ICSID) to “provide facilities for conciliation and arbitration of investment disputes between contracting states and nationals of other contracting states...”\textsuperscript{206} Thus fears of executive and legislative intervention in contracts that may disadvantage foreign investors are put to rest.\textsuperscript{207}

7.2 Jurisdiction of the Centre

The jurisdiction of the Centre is limited. In other words it does not deal with all types of disputes. Its jurisdiction is conditioned by three factors. These are the personalities of the parties, their consent and the subject matter of the dispute.\textsuperscript{208}

7.2.1 Personality

The Centre has jurisdiction only in respect of matters in which one party is a state and the other is a foreign private enterprise. The host state and the state of the foreign investor should be parties to the Convention. They need not be parties at the time of the agreement. They must however be members on the date the dispute is submitted to the Centre.\textsuperscript{209}

7.2.1.1 Nationality of the investor

The investor should be a national of a contracting state on the date the parties consented to submit the dispute to the Centre as well as the date on which the request for arbitration was registered.\textsuperscript{210} The investor may be a natural or juristic person. In a modern economic world where companies have offices and subdivisions every where, it is not always easy to discern the nationality of an investor. Wolfgang is of the view that the nationality of a company is determined by its place of incorporation, the location of its registered office or its seat.\textsuperscript{211} This is the widely accepted view. Cheshire and North suggest that when dealing with multinational companies, nationality should be determined by reference to where its seat is located. The seat of the company in this regard will be determined by reference to the decision making centre of the company.\textsuperscript{212} Broches accepts that nationality should be determined by

\textsuperscript{206} Article 1(2).
\textsuperscript{207} Wolfgang \textit{ibid}.
\textsuperscript{208} Mwenda and Gobir “International Commercial Arbitration and the International Centre for Settlement of Investment Disputes” 1998 \textit{Zambia Law Journal} 91 at 95.
\textsuperscript{209} \textit{Ibid} 98.
\textsuperscript{210} Article 25(2).
\textsuperscript{211} Wolfgang \textit{ibid} 311.
the company’s place of incorporation or its seat. However, he suggests that the
parties should be given autonomy to determine the meaning of nationality. In his
opinion, a party should be given the “widest possible latitude to agree on the meaning
of nationality” and the tribunal should use a wide approach in this regard. Hirsch
disagrees with this point of view. He states that such a broad and flexible definition is
unknown to international law and should therefore be rejected. In my considered
opinion, the acceptable rules of international law relating to the determination of the
nationality of companies are conditioned by its place of incorporation, the location of
its seat and the place of control.

7.2.2 Consent of the parties
Both parties to the dispute should consent to the Centre’s jurisdiction. Consent for the
purpose of ICSID arbitration need not be in the form of a formal document. Therefore a
government approval to an application for an investment license which
contains an ICSID arbitration clause will amount to consent. Similarly, where a
clause in a document, separate from the main contractual document requires ICSID
arbitration, this will constitute consent. A state is permitted to give limited consent.
In terms of the Convention a state may after ratification notify ICSID that it will
only submit to a certain class of disputes.

Consent can also take place on the legislative front. This happens when a state by
legislation, unilaterally undertakes to submit to the Centre’s jurisdiction. A question
which may arise is whether such unilateral declaration binds the state and the investor
without more. In other words, what will the position be where an investor invests in
such a state without communicating its consent to the state or the Centre? It is
submitted that by investing in such a state, the investor impliedly consents to ICSID
arbitration. The legislation of the state naturally binds the investor. Similarly the state

213 Broches “The Convention on the Settlement of Investment Disputes Between States and Nationals
of other States” 1972 Recueil des Cours 360 at 361.
214 See Hirsch The Arbitration Mechanism of the International Center for the Settlement of Investment
215 Ibid.
216 Ibid 91.
217 Amco Asia et al v Indonesia ICSID Case No. ARB/81/1; ICSID Reports 1993 I 377.
218 Holliday im et al v Morocco ICSID Case No. ARB/72/1. See also Ouest Africaine des Betons
Industriels (SOABI) v Senegal ICSID Case No. ARB/82/1.
219 Article 25(2).
is bound by its own laws. It can be concluded therefore that the legislation is an irrevocable declaration by the state to be bound by ICSID arbitration. It should not be permitted to withdraw from a commitment which was relied upon by an investor even if the investor has not formally made a written consent. It will be contrary to the internationally accepted concept of good faith for an investor who has invested in reliance of a state's declaration, that it will have recourse to ICSID arbitration, to be later deprived of that promise.\footnote{Ibid 54.} Similarly, an investor investing on such basis should not be permitted to later reject ICSID arbitration. Apart from the fact that investors usually research the laws of states before committing themselves, they should be prevented by the doctrine of \textit{ignoratia juris neminem excusat} from claiming that they were unaware of the laws of the host country. Consent can only be withdrawn by the express agreement of both parties.

Consent may also be given pursuant to public international law.\footnote{Ibid.} This involves bilateral agreements between states. In terms of these agreements each state agrees to refer investment disputes between investors of the other state and itself to the Centre. The agreement is made between states for the benefit of their subjects. The undertaking of the states become binding when the consent of the investor is received.\footnote{Ibid 55.} Such treaties give protection only to the investor and not the state. Though they are binding on the state, the investors are not bound to submit to ICSID arbitration under such treaties\footnote{Ibid.} unless they file a consent. In this situation it cannot be said that an investor gives consent merely by investing in the state. It must be noted that the agreement is made on the international level between the states. Each state agrees with the other to submit to disputes arising between it and nationals of the other state. Such treaties are instruments of public international law to which private investors cannot be parties. They are only made for the benefit of investors. The investors are only bound when they file a consent. By so doing they do not become parties to the treaty. They are merely accepting the promise of the other contracting state to submit to the Centre in the event of a dispute. However, not all such treaties
are binding offers of consent. Some are merely promises of future consent by the state and are not necessarily binding on them.\textsuperscript{225}

7.2.2.1 Consent of subdivisions and agencies

More often than not, consent is made by a subdivision or agency of a government, acting on its behalf. This is permitted in terms of article 25(3) of the Convention. Such consent however must be approved by the state. Agencies are bodies which are separate legal entities from government such as parastatals, corporations or companies. However, many of them were set up to provide essential services which were hitherto provided by government before the introduction of privatisation in developing countries. In fact, many parastatals are established by Acts of parliament. Subdivisions on the other hand are actual components of the body of government. They include government ministries, local government bodies and state components of federations.\textsuperscript{226} In my view, agencies are independent bodies, separate from government. Subdivisions however are governmental structures whose primary functions are public in nature. Professor Schreuer contends that consent by a subdivision or agency does not extend to the state.\textsuperscript{227} He suggests that a separate consent should be obtained from the state to guard against any subsequent state interference through acts of public authority and the use of the defence of \textit{force majeure} by the subdivision or agency.\textsuperscript{228} He further argues that this will protect the investor in the event that the subdivision is subsequently abolished or privatised, or if the administrative structure of the agency is shifted or changed. He suggests that should the agency be replaced by a new one, the state should undertake that the consent of the previous agency will be transferred to the new one. He proposes that the state should undertake to substitute itself in the stead of the agency or subdivision should it subsequently cease to exist or if its composition changes. This is a contractual solution which will undoubtedly protect the investor. The question that now falls to be determined is whether an approval is required from a state in the event that its subdivision or agency consents to ICSID arbitration.

\textsuperscript{225} Schreuer \textit{The ICSID Convention: A Commentary} (2001) 212.

\textsuperscript{226} See \textit{Ibid} at 148-155 for a discussion on the meaning and differences between subdivisions and agencies and the difficulties encountered by the drafters of the Convention before the terms were finally agreed upon.

\textsuperscript{227} \textit{Ibid} 171.

\textsuperscript{228} \textit{Ibid}.
7.2.2.1.1 Consent of agencies

It is my view that an approval of the state is unnecessary in two circumstances. Firstly, where the subject matter of the investment is such that the agency can be said to be performing a public function, and secondly, where the agency has such close connection with the state that it can be said to be an extension of the state. Under these circumstances, the consent of an agency should bind the state without express state approval. Therefore, where a government parastatal whose officials are hired and fired by government or whose board of governors is appointed by government, negotiates an investment involving the exploitation of a country's natural resources and wealth such as mineral resources, its consent should bind the state. In developing countries mineral resources are regarded as the nation's wealth even where their exploration is privatised. Usually, all mineral resources are vested in the state by law. There is public concern as to how the profits are shared as the citizens regard mineral wealth as the nation's property. The fact that a parastatal or company is appointed to manage these resources does not make a difference. Therefore, when a government agency enters into an investment contract in its performance of a public function, I do not see how the consent of such agency cannot be attributable to the state. The reality of the politico-economic land-scape of developing countries is such that these agencies are never really independent. To put it blandly a government agency in a developing country will hardly enter into an investment agreement with a foreign enterprise on public matters, without an approval from the government. No difficulty therefore should be encountered in attributing the consent of such agencies to the state.

7.2.2.1.2 Consent of subdivisions

It is clear that government ministries are integral organs of central government. Therefore, a consent made by a government ministry naturally binds the state. In relation to other political institutions such as local and state governments, different considerations will apply, depending on whether it is a unitary or federal state. In a unitary state the consent of a subdivision such as a local government body should bind the state. Federal constitutions usually bestow certain matters of state on state governments while other matters such as defence, foreign affairs and mining are usually controlled by the federal government. In a federation, the consent of a state
component should not bind the federal government in relation to matters in respect of which powers are bestowed on state entities. It will only bind the federation in respect of matters which the federal constitution bestows on the federal government.

7.2.3 Subject matter
ICSID jurisdiction is limited only to investment disputes. The Convention does not define an investment dispute. An important question is whether and what role the consent of the parties play in determining whether a dispute is an investment dispute. The executive directors in their Report, state that no attempt has been made to define the term “investment” given the essential requirement of the consent of the parties and the fact that states can make known in advance the classes of the dispute that they will submit to the Centre.229 Hirsch is therefore of the view that consent is an important factor in considering whether a dispute arises from an investment for the purposes of jurisdiction.230

It is submitted that though consent is a prerequisite for jurisdiction, there is no basis for using the consent factor to determine whether a dispute arises from an investment. Investment should be determined by the nature and volume of the transaction. A transaction will amount to an investment when a company or person transfers technical knowledge or a substantial amount of money or capital to the host state on a long term basis. This is a safe conclusion to draw having regard to the views expressed by an ICSID tribunal in the matter of Alcoa Minerals of Jamaica v Government of Jamaica231 where it was stated that the Convention contemplated jurisdiction where a private company invests substantial amounts in a foreign state in reliance upon an agreement with that state.232

7.2.4 Recognition and enforcement of the award
Member states undertake to enforce ICSID awards in their territories as if they were judgments of their courts.233 The award is final and binding and cannot be questioned or challenged in domestic courts. ICSID proceedings are completely removed from

231 ICSID Case No. ARB/74/2.
232 Cited in Mwenda and Gobit Ibid at 99.
233 Article 54 of the Convention.
domestic legal systems. The awards are directly and immediately enforceable in all member states thereby rendering recognition proceedings unnecessary. This is referred to as the rule of judicial abstention. In propounding this rule, Brower and Goodman state that “municipal courts when seized of a claim arising out of an agreement providing for ICSID arbitration, should refrain from adjudication.”

According to Wolfgang, the binding nature of the award is reflected by the fact that even the public policy of the country cannot prevent its enforcement. Hirsch is also of the view that ICSID awards are not subject to national public policies because the intention of the Convention was to create an international arbitral system independent from domestic legal systems. While I agree with the learned authors that ICSID awards are directly enforceable and not subject to the public policies of states, one must state that this is so because ICSID awards have the status of national judgments. I quite agree that “ICSID arbitration proceedings takes place in the context of truly international norms set forth in the convention...” However, in the case of enforcement, the Convention places the process squarely in the domestic legal system where such enforcement is sought. The Convention provides that the “execution of the award shall be governed by the laws concerning the execution of judgments in force in the state in whose territories such execution is sought.” This means that ICSID awards are not subject to domestic laws governing the enforcement of arbitral awards. Domestic laws as well as conventions and the Model Law usually make it a condition that the enforcement of foreign and international arbitral awards is subject to the public policy of the state in which enforcement is sought. It is however clear from the Convention that ICSID awards should not be scrutinised under national arbitration laws. In other words, for the purposes of enforcement, ICSID awards do not fall under laws relating to the enforcement of arbitral awards but under laws relating to the execution of domestic judgments. They are treated in the state of enforcement, as domestic judgments and not as awards. This view is strengthened by the fact that the Convention uses the word “execution” which is usually used in relation to judgments and not “enforcement” which is used in relation to awards. This

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235 Wolfgang Ibid 108.
236 Hirsch Ibid 114.
238 Article 54(3).
shows that for the purposes of the Convention, awards are equivalent to judgments of the place of enforcement.

7.2.5 Enforcement against states and sovereign immunity

The execution of an ICSID award is subject to the laws of sovereign immunity of the state in which enforcement is sought.\textsuperscript{239} It follows that an attempt to enforce an award against a state might be resisted with the defence of sovereign immunity. In terms of this defence foreign states enjoy immunity from prosecution or action in municipal courts.\textsuperscript{240} In the case of \textit{Letco v Republic of Liberia}\textsuperscript{241} the Court held that execution could not be made against tax revenues of Liberia as these were funds used for governmental functions and do not fall under the exceptions to immunity stipulated in the United States Foreign State Immunity Act. However this should not lead to a bleak conclusion that ICSID awards will always stumble against the brick wall of sovereign immunity. In recent years, the doctrine of absolute immunity whereby both public and commercial activities of governments enjoyed immunity has been eroded.\textsuperscript{242} Many states have embraced the doctrine of qualified immunity whereby only acts performed in the public function of government enjoy immunity.\textsuperscript{243} Therefore, execution can take place in respect of state funds and assets that are not specifically used for governmental purposes. Also, because of political and economic reasons, states want to be seen as cooperating with ICSID. ICSID is backed by the World Bank which is a powerful and influential economic institution. This can be said to serve as an overt or extra-legal pressure on states to comply with ICSID awards.\textsuperscript{244} Further, states do not want to be seen as not honouring their commitments under ICSID as this may create bad publicity for them thereby driving away potential investors.\textsuperscript{245} Furthermore, the parties may include a waiver of immunity clause in the contract whereby the state waives its claim to immunity from execution.\textsuperscript{246}

\textsuperscript{239} Article 55.
\textsuperscript{241} 26 ILM 1987 695.
\textsuperscript{243} Trendex Trading Corporation \textit{v} Central Bank of Nigeria 1977 QB 529 CA.
\textsuperscript{244} Asouzu “Conciliation under the 1988 Arbitration and Conciliation Act of Nigeria” 1993 5 \textit{African Journal of International and Comparative Law} 825 at 844.
\textsuperscript{245} Ayemang “African States and ICSID Arbitration” 1988 21 \textit{CILSA} 177 at 181.
8. CONCLUSION

In reality, arbitration requires judicial assistance in order to be effective. The coercive powers of the courts are often called upon for the enforcement of awards. Unlike mediation and conciliation, arbitration seeks to produce results that are binding and enforceable. By resorting to international arbitration, the parties select a dispute resolution mechanism that falls outside their judicial systems. However, international awards are subjected to the rigours of courts through recognition and enforcement proceedings. It seems to me therefore, that in recognition and enforcement proceedings, courts should restrict themselves to ascertaining the award and ensuring that the basic principles of fairness were observed. In ascertaining the award, the courts should ensure that it is authentic. In ensuring that the principles of fairness were observed the courts should ensure that the rules of natural justice were observed, that the defendant was informed of the arbitration and that both parties had an opportunity to present their case.

International conventions are important in that they establish minimum standards of treatment of awards by national courts. But strictly speaking, most conventions cater for foreign awards. International conventions should play a part in the regulation of international commercial arbitration. It is clear that international conventions do not really regulate international commercial arbitration. The European Convention of 1961 comes close but its provisions are still insufficient. The New York Convention has fallen behind the times. It does not regulate the conduct of arbitration. For example, it lacks provisions relating to the composition of the tribunal and the applicable rules. It is recommended that an international convention should be concluded with provisions that relate to the regulation of international arbitration while at the same time creating minimum standards for the recognition and enforcement of international awards. A clear definition of international commercial arbitration should be incorporated in the convention. The definition of international commercial arbitration contained in the UNCITRAL Model Law can be a guide in this regard. Further, the definition should cater for arbitrations governed by international legal norms and delocalised arbitration. The proposed convention should enjoin contracting parties to undertake to enforce awards emanating from such arbitration. Its provisions should be flexible and provide options for the parties to operate within a wide sphere rather than restricting them to strict compliance. The
several reasons upon which awards can be resisted should be limited to those specified in the Model Law. Consultation must be made with the rules of international institutions in forging the convention, as they have been tried and tested. Further, any material conflict with these rules must be avoided. Without a convention that provides for an atmosphere whereby the parties have a level of autonomy, national courts will continue to assess international arbitral awards on their own standards and from local perspectives which the parties have not bargained for. Recognition and enforcement of international awards will become easier with the acceptance of a convention that provides for international commercial arbitration.

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247 See articles 34 and 36 of the Model Law.
CHAPTER 4
GENERAL CONCLUSIONS

Recognition and enforcement of awards are the greatest obstacles to the progressive development of international commercial arbitration.\(^1\) The lack of universally harmonised rules and procedures for the recognition and enforcement of international awards is a stumbling-block.

Multilateral and regional conventions have played a great role not only at harmonisation, but also in making the enforcement of international awards easier. They aim to promote uniform recognition and enforcement of foreign and international awards in all contracting states.\(^2\) They limit the grounds on which a party can object to the enforcement of arbitral awards to certain specific grounds.\(^3\) Whereas the Geneva Convention required the party seeking enforcement to prove that the award was properly obtained, the New York Convention now requires the party resisting the award to prove that it was not obtained in terms of the Convention.\(^4\) Several conventions have followed this trend. Though conventions make clear provisions for the enforcement of foreign awards, they do not make clear provisions for the enforcement of international or so called a-national awards. Several contracts are international strictly speaking, not having been subjected to the law of any particular state. Awards made pursuant to such arrangements may still encounter problems in jurisdictions whose laws do not cater for the enforcement of such awards. It is submitted that if conventions are to keep abreast of commercial realities, they should make clear provisions for the recognition and enforcement of international or a-national awards.

It is my opinion that a new multilateral convention is required to replace the New York Convention. The New York Convention has served its purpose and it is time for a new

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\(^3\) For example article V of the New York Convention.

\(^4\) Nattier Ibid 403.
convention with clear a definition of international commercial arbitration, which gives primary consideration to the nature of the laws applicable to the dispute and arbitral proceedings. In drafting a new convention, it might be useful to borrow some of the provisions which have been inserted in the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. Admittedly, this Convention principally caters for problems relating to jurisdiction in transnational litigation, a problem which does not concern arbitration. However, some of its provisions may be borrowed for the purposes of a new convention on arbitration. One such provision relates to severability. In this respect, where a judgment contains elements that are severable, one or more of them may be separately recognised and enforced.\(^5\) The Draft also provides for uniform interpretation of its provisions.\(^6\) In terms of this provision, regard should be given to its international character and the need to promote uniformity in its application. It further requires national courts to take due account of case law of other states when applying and interpreting its provisions. Similar provisions will be particularly helpful in a convention on international arbitration. In promoting harmonisation, it is desirable that the proposed convention replaces the various regional conventions. Though the replacement of regional conventions by a single universal convention on recognition and enforcement is preferable, it is doubtful whether the political will for such an arrangement exists.

Notwithstanding the positive role played by conventions, national legislations should also play a role in creating a better climate for the enforcement of international arbitral awards. Many countries have modernised their arbitration laws to meet the demands of the world’s globalised economy. According to Martin Domke, a modern arbitration legislation should have certain characteristics. It should (1) make the agreement to arbitrate irrevocable (2) enable the parties to enforce the award in a court of law (3) provide for a stay of any court action instituted in violation of the arbitration agreement until the arbitration has taken place (4) specify the grounds on which an award may be attacked (5) restrict the powers of courts to review findings of fact by the arbitrator and


\(^6\) Article 38 *Ibid.*
his application of the law.\textsuperscript{7} It is recommended, and indeed several modern arbitration legislations limit curial intervention in arbitration proceedings, and have moved towards party autonomy.\textsuperscript{8} In my opinion, the role of the courts should be limited to supporting the arbitration proceedings and making it effective rather than strangling its progress. National legislations should give sufficient powers to arbitrators so that they are able to control the proceedings without unnecessary curial interventions. The role of the courts should be limited to ensuring that the due process of law is observed. In other words the tribunal should have charge of the proceedings while the courts play a supporting role. This will enable proceedings to be completed swiftly and awards enforced within reasonable time. It must be noted however that judicial powers cannot be totally eliminated from the arbitral process and that is not the purpose of arbitration. The argument here is that the courts should support the arbitral process and give effect to its award rather than control the tribunal. Several countries have taken steps for the enforcement of international commercial arbitration by adopting the UNCITRAL Model Law. The Model Law liberalises international commercial arbitration by giving effect to party autonomy and limiting the role of national courts.\textsuperscript{9} It is submitted that the Model Law will harmonise domestic arbitration laws if adopted by states. France on the other hand introduced legislation providing specifically for the recognition and enforcement of international commercial awards. This shows that states can simply provide for the enforcement of international awards by legislative act.

National courts also play an important role in the enforcement of arbitral awards. The problem of conventions being given varying interpretations in different countries\textsuperscript{10} is an obstacle to the harmonisation of recognition and enforcement proceedings. The unifying effect of EU law and policy and the guiding hand of the ECJ can lead to uniformity in the EU. This may not be so in other regions. However, it is not impossible that "legal comparism" among academics and judges might ultimately cause a convergence in legal

\textsuperscript{8} Mantilla-Serrano "Major Trends in International Commercial Arbitration in Latin America" 2000 17 \textit{Journal of International Arbitration} 139 at 141.
thought in various jurisdictions, in relation to the interpretation of conventions. Of course, the process will be slow and painfully long, but such a situation would have been easier attained in the absence of so many conventions. Such a situation should however be attainable with a new single convention.\footnote{See foot note 6.} But most importantly, courts should adopt a pro-enforcement stance.

Though recognition and enforcement of international awards can be problematic, the fact that international commercial arbitration is on the rise is a pointer to the fact that it is an effective mode of dispute settlement. International commercial arbitration is still evolving and though room exists for improvement, one should not label the system as a failure.
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