International and Domestic Arbitration Regimes – Should They be Combined or Separated?

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ABSTRACT

The question of whether states should combine their arbitration regimes to simultaneously address international and domestic arbitration may appear to be relatively simply. Indeed, with the advent of the UNCITRAL Model Law, it could be said that states should move to prevent any dichotomy between their domestic and international arbitration regimes. This paper therefore explores whether states should follow the example of Hong Kong, Germany and the United Kingdom and employ a unitary regime applying to all arbitration. This exploration is conducted with a focus on whether divergences from the UNCITRAL Model Law in approaching domestic arbitration are justified. Ultimately, it seems that there does exist some factors that may gives states pause before combining their arbitration regimes.

I. INTRODUCTION

Arbitration is heralded by many as the preferred method of international commercial dispute resolution.[2] Indeed, as was acknowledged by Barwick CJ in *Tuta Products Pty Ltd v Hutcheson Brost Pty Ltd,* the advantages of arbitration are threefold: 'economy, celerity and finality'.[3] These three advantages have not always been present throughout arbitration's rich history. However, in recent times the UNCITRAL Model Law on Commercial Arbitration ('***Model Law (1985)***'), which has been widely adopted by states in their arbitration frameworks, has been a catalyst for ensuring the efficiency and legitimacy of arbitration. It has proved itself to be a valuable aspect of the international arbitration landscape and has cemented the principles of party autonomy and minimal court intervention in international commercial arbitration discourse and practice. However, the Model Law was designed chiefly for international arbitration and so has not necessarily been fully adopted for domestic arbitration, where states often revert to the needs and

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2 2018 International Arbitration Survey: The Evolution of International Arbitration, White & Case (2018), https://www.whitecase.com/publications/insight/2018-international-arbitration-survey-evolution-international-arbitration (last visited Aug 12, 2018).

3 *Tuta Products Pty Ltd v Hutcheson Brost Pty Ltd* (1972) 126 CLR 253.

tendencies of their own jurisdiction. The purpose of this paper is therefore to explore a simple question: whether domestic and international arbitration regimes should be combined to uniformly apply the Model Law and associated legal concepts to all arbitrations? To that end, the paper adopts the following three-part structure:

A. First, it seeks to briefly explore the causes for these differences in approach to domestic and international arbitration. It therefore considers the qualities that have made the UNCITRAL Model Law so ubiquitous, while also tracing the rich and diverse history of arbitration;

B. Second, it explores the legislative frameworks applying to domestic and international arbitrations and compares the dualist and unitary approaches adopted by differing jurisdictions for domestic and international arbitration. This is accompanied by an exploration of how these dualist regimes differentiate domestic and international arbitration; and

C. Third, in those jurisdictions where a distinction between domestic and international arbitration is maintained, this paper considers the different frameworks applying to domestic and international arbitration. This facilitates an analysis of whether these distinctions are merited and whether they enhance the economy, celerity and finality of domestic arbitration.

The author ultimately views that there are compelling arguments for ensuring the homogeneity of arbitration, be it domestic or international. Where domestic regimes create an unnecessary distinction between these two types of arbitration, efforts should be made to encourage cohesion with the Model Law. Nevertheless, this does not mean that all separation and nuance is impermissible. To the contrary, it seems that there are strong arguments that restraint should be shown to respect the unique public interests of states.

As the UNCITRAL Model Law continues to be adopted, and domestic arbitration continues to grow alongside its international counterpart, the question of whether these regimes should be combined or separated will remain a pertinent area for consideration. In contributing to this discourse, this paper first commences with an analysis of the UNCITRAL Model Law.

II. THE UNCITRAL MODEL LAW

In 1985, the United Nations Commission on International Trade Law (‘***UNCITRAL***’) introduced the Model Law on Commercial Arbitration.[4] This was intended to provide guidance to states on a

[4] United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006* (Vienna: United Nations,

framework for regulation of international commercial arbitration in line with global best practice. To date, 80 states have incorporated the UNCITRAL Model Law into their legislation, covering over 110 jurisdictions.[5] The Model Law has endured as an example of international best practice in the twenty-first century and was amended in 2006 to reflect the changing understanding and practice of arbitration and to ensure that it remains representative of international best practice. Although the Model Law was intended to apply to international arbitration, since its inception it has been noted that the law could apply to domestic disputes. This is confirmed by the *travaux preparatoires* of the Model Law, which state:[6]

> Finally in these [international] cases the interest of a state in maintaining its traditional concepts and familiar rules is less strong than in a strictly domestic setting. However, despite this design and legislative self-restraint, **any state is free to take the model law, whether immediately or at a later stage, as a model for legislation on domestic arbitration and, thus, avoid a dichotomy within its arbitration law**
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> (author's emphasis)

Indeed, the UNCITRAL Model Law presents a robust and effective framework for arbitration. The Model Law was intended to be a comprehensive law, regulating all parts of the arbitral process, from the arbitration agreement to the recognition and enforcement of arbitral awards. One of the most important aspects in developing the Model Law was producing a legal framework that would be acceptable to all states regardless of legal system or economic situation.

The main features of the Model Law can be roughly grouped into the following categories: general principles, the arbitration agreement, jurisdiction of the arbitral tribunal, interim measures, conduct of arbitral proceedings, recourse against award and recognition and enforcement of award. It is useful to briefly explore each of these categories to understand the value of the Model Law in facilitating both domestic and international arbitration.

A. General Principles

In 2006, Article 2A was added to the Model Law, which provides that in interpreting the Model Law, 'regard should be had to its international origin and the need to promote uniformity in its application and in the observance of good faith'.[7] Further, Article 2A(2) provides that matters not

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2008), www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html ('UNCITRAL Model Law').

[5] UNCITRAL, *UNCITRAL Model Law on International Commercial Arbitration* (1985), *with amendments as adopted in 2006,* UNCITRAL (August 10, 2018, 10.03 AM), www.uncitral.org/uncitral/en/uncitral_tests/arbitration/1985Model_arbitration_status.html.

[6] UNCITRAL, *Analytical Commentary on Draft Text of a Model Law on Commercial Arbitration*, UNCITRAL (August 9, 2018, 9.44 AM) https://documents-dds ny.un.org/doc/UNDOC/GEN/V85/244/18/PDF/V8524418.pdf?OpenElement .

[7] UNCITRAL Model Law, Art. 2A.

explicitly considered within the Model Law should be settled in accordance with the general principles underpinning the Model Law. Article 2A(1) reinforces the importance of taking a uniform approach to interpreting the Model Law, and serves as a reminder that interpretation of the Model Law should always be done with its international origins in mind. Ideally, this provision might serve to remind judges of the importance of adhering to a universal standard in international arbitration, in order that international arbitration might be a viable alternative to litigation, no matter where the parties are from or where the dispute is heard. Article 2A(2), on the other hand, presents challenges of interpretation as the "general principles" upon which the Model Law is based are not specifically enumerated within the Model Law, or its supporting documents. Thus, it is up to the user to determine the general principles upon which the Model Law is based. At the very least, as will be seen in the following discussion of the Model Law's fundamental provisions, it is likely that the principles of party autonomy and minimising court intervention in the arbitral process could be said to be general principles upon which the Model Law is based.

The principle of minimising court intervention in arbitration proceedings is most succinctly encapsulated in Art 5 of the Model Law, which states that:

> In matters governed by this Law, no court shall intervene except where so provided in this Law.

According to the UNCITRAL's Analytical Commentary of the Model Law, Art 5 was designed to achieve certainty regarding the maximum extent of judicial intervention by excluding 'any general or residual powers' of the courts.[8] However, this provision has been subject to differing interpretations, particularly concerning what is meant by, 'in matters governed by this Law'. Effectively, where the Model Law is silent on a particular issue, the court is left to determine whether that is because the Model Law envisages that the court should not have a specific power, or whether it is because it is a matter not governed by the Model Law, in which case the court is free to intervene, insofar as local laws allow.

B. Arbitration Agreement

Article 8 of the Model Law further emphasises the principles of party autonomy and non-intervention, providing that where there is a valid arbitration agreement[9] the court must grant a stay of curial proceedings and refer the parties to arbitration. The granting of the stay is on the condition that the application is made by the party seeking the stay no later than when submitting the party's first statement on the substance of the dispute. While the application is pending before the court, the arbitration may commence or continue and an award may be granted.

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8 UNCITRAL, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, 18th sess, UN Doc. A/CN.9/264 (3-21 June 1985) Art 5, para 2 ('UNCITRAL Analytical Commentary').

9 For the purposes of Art 8, an arbitration agreement will be valid so long as it is not "null, void, inoperative or incapable of being performed."

This article is significant because it does not leave any discretion for the courts as to whether or not a stay should be granted. In many jurisdictions, this discretion introduced uncertainty into the arbitration process, as the possibility existed that despite the agreement of the parties, the courts could refuse to order a stay of proceedings, rendering the arbitration agreement impotent. Without such discretion, parties can be assured that their agreement to arbitrate will be enforced, so long as it is not null, void, inoperative or incapable of being performed.

C. Jurisdiction of the Arbitral Tribunal

Article 16 of the Model Law also establishes two important principles of arbitration: "*Kompetenz-Kompetenz*" and separability. *Kompetenz-Kompetenz* allows the tribunal to rule upon its own jurisdiction, and separability provides that the arbitration clause is separate and independent from the contract of which it forms part. Both competence-competence and separability are essential elements of modern arbitration practice and recognise that the arbitral tribunal is the most appropriate forum for determining any disputes that arise in relation to a dispute that the parties have agreed to arbitrate, even when questions are raised about the validity of the arbitral proceedings themselves.

D. Interim Measures

The original 1985 Model Law provided for interim measures in a relatively limited capacity. The 2006 amendments greatly expanded on this, explicitly explaining (but not limiting) the nature of interim orders that may be ordered in relation to arbitral proceedings and the conditions upon which they may be granted, as well as empowering the tribunal to grant preliminary orders (*ex parte* applications for interim measures), modify, suspend or terminate interim orders, grant interim orders conditional on the provision of security, impose disclosure requirements or make orders relating to costs or damages relating to interim orders. Articles 17-17J provide a comprehensive regime by which interim measures can be applied to international arbitrations.[10] Further, the enforcement regime of interim measures mirrors the enforcement regime for arbitral awards as provided for in Arts 34 and 35 the Model Law,[11] which are based on Art V of the New York Convention. Finally, Art 17J provides that the court will have the same power of issuing an interim measure as the arbitral tribunal.

E. Conduct of Arbitral Proceedings

Articles 18 and 19 of the Model Law are viewed as greatly significant and described in the Analytical Commentary as the 'Magna Carta' of the Model Law.[12] Article 19 gives effect to the overriding principle of party autonomy in international arbitration. Article 19 allows the parties to determine the procedure by which their dispute should be settled. If the parties fail to agree as to

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[10] UNCITRAL Model Law Art 17-17J.

[11] *Id* Art 34-35.

[12] UNCITRAL Analytical Commentary, *supra* note 8, Art 19, para 1.

the procedure of the arbitration, the arbitral tribunal is empowered to conduct the arbitration in such a manner as it considers appropriate. This general power of the arbitral tribunal is subject to Art 18, which embodies the principle that the parties should be treated equally and given a full opportunity to present their cases. This requirement of equality of treatment and guaranteeing a full opportunity to present one's case is a central tenant in ensuring that disputes that are submitted to arbitration are resolved fairly, and that all parties feel that their cases have been fully presented to the tribunal.

F. Overall Significance of the Model Law

Ultimately, the Model Law was an aspirational endeavour. This attempt to harmonise the approach that states take to international arbitration was unprecedented. Indeed, even the concept of a Model Law was relatively untested in 1985. Despite this, the Model Law has been a vastly successful enterprise. As one commentator notes:[13]

> For the experienced arbitration practitioner, the prospect of participating in arbitration with its seat in a 'Model Law State' usually augurs a largely predictable journey in well-navigated waters.

The success of the Model Law therefore begs the question as to whether concerted efforts should be made to extend its operation to all domestic arbitrations, with the effect of ensuring a uniform practice between both domestic and international arbitration.

III. THE DEVELOPMENT OF ARBITRATION

Despite arbitration's twentieth century rebirth,[14] it is useful to remember its ancient origins. The history of arbitration can be traced back to the ancient civilizations of Greece and Rome where both states and commercial parties embraced early forms of arbitration.[15] In surveying the road travelled from that point in time, it becomes clear that there are numerous examples of arbitration developing independently across the world. Arbitration has flourished in Latin America, where Brazil, in 1850, enacted legislation obliging parties to use arbitration in commercial disputes.[16] In India and Asia, informal dispute mechanisms were deployed well before the nineteenth and twentieth centuries and binding forms of arbitration were already developing in Thailand as early

13 Fernando Mantilla-Serrano & John Adam, *UNCITRAL Model Law: Missed Opportunities for Enhanced Uniformity,* 31 UNSW Law Journal 307, 307-318 (2008).

14 This rebirth has been facilitated by the UNCITRAL Model Law and the New York Convention.

15 Gary Born, *International Arbitration: Law and Practice* 7-8 (2nd Ed. 2012).

16 *Id* 61-62, citing Falcao, *Recognition and Enforcement of Foreign Arbitral Awards: A New Chapter in Brazilian Arbitration History,* 8. Am. Rev. Int'l Arb. 367, 369 (1997).

as the nineteenth century.[17] At the same time German courts were also fostering their own unique form of arbitration, which had been developed by their Civil Code and Procedure. Indeed, while the UNCITRAL Model Law has had a significant role in developing the homogeneity of international commercial arbitration; it is understandable that nuances still exist in the different approaches of states to domestic arbitration.

Equally importantly, it must be remembered that arbitration was treated with caution for much of the early twentieth century in Europe and the United States. In France, England and Germany, arbitration was perceived as a threat to the rule of law and a crude and ineffective substitute to the dispute resolution provided by their respective judiciaries.[18]

With this context in mind, this paper now turns to the present day to address the divergent approaches of states to the legislative frameworks for domestic and international arbitration.

IV. FORMS OF LEGISLATIVE FRAMEWORKS – "DUALIST & UNITARY REGIMES"

This paper now turns to consider the recent approach of states in developing their arbitration frameworks. As has been explained, the UNCITRAL Model Law is widely adopted by states as the foundation of their framework for international commercial arbitration. Indeed, in Taiwan the *Arbitration Act* is largely based in the Model Law. The practical difference in the different approaches of states is therefore the extent to which the UNCITRAL Model Law is applied to domestic arbitration. There are generally two approaches to the structuring of these frameworks:

- First, states can separate their regulation of domestic and international arbitration, applying separate provisions to each (referred to as the '***dualist approach***'); or

- Second, states can apply a single legislative framework to all arbitrations, resulting in a uniform framework (referred to as the '***unitary approach***').

These approaches can be viewed as reflecting the differing theoretical understandings of arbitration. One view considers that as all arbitration is largely governed by the law of the seat, there can be no sound justification for applying separate rules to domestic and international arbitration.[19] Such a perspective lends support to the adoption of a unitary framework. Others see international and domestic arbitration as distinct and view that the effectiveness of international

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17 *Id* 59, citing M. Moser & J. Choong, *Asia Arbitration Handbook* 583 (2011).

18 Gary Born, *supra* note 15, 35-44.

19 Joseph Mante, 'Abitrability and Public Policy: An African Perspective' 33 *Arbitration International* 275, 283 (2017); F.A Mann, "Lex Facit Arbitrum' in International Arbitration, 2 *Arbitration International* 241, 244 (1986).

arbitration is not predicated on national law or enforcement.[20] This view seems to accept that domestic and international arbitration may be individually regulated, lending towards a dualist approach.[21] Of course it cannot be said that these are the sole rationales for embracing a unitary or dualist approach to regulating arbitration nor can it be said that states strictly comply with such a binary construction. Indeed, not all legal frameworks are either dualist or unitary, with many operating somewhere amongst this spectrum. For instance, states may also incorporate regulations which do not apply mandatorily but to which parties can consent. However, it provides a useful starting point from which to consider the differences in approach.

A. Bifurcating Domestic and International Arbitration

Many states, including Hong Kong, France, Canada and Australia, provide for a dualist legislative approach to arbitration, dividing their regulation between domestic and international arbitration. This allows jurisdictions to apply different laws and standards between these different kinds of arbitration.

Such an approach requires states to define what constitutes a domestic or international arbitration. While this may seem a simple question, it can present challenging questions. Is an arbitration between two domestic parties, but seated overseas, international? Does the subject matter of the dispute or contract being overseas render an arbitration international? The UNCITRAL Model Law sets out some answers to these questions at Article 1(3), which states:[22]

> (3) An arbitration is international if:
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> (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
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> (b) one of the following places is situated outside the State in which the parties have their place of business:
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> (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
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> (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

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20 Peer Zumbansen, 'Piercing the Legal Veil: Commercial Arbitration and Transnational Law' WUI Working Paper, http://cadmus.eui.eu/bitstream/handle/1814/189/law02-11.pdf?sequence=1&isAllowed=y

21 Joseph Mante, *supra note* 19, 283.

22 UNCITRAL Model Law, art. 1(3)

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

Many jurisdictions have incorporated this Model Law provision, but states still do present differing approaches to determining whether a dispute is domestic or international. It is therefore useful to carry out a comparative analysis of the approaches of several jurisdictions, including France, Singapore, India and Australia.

The distinction between domestic and international arbitration is often determined by the principle of territoriality or by the actual subject matter of the contract. As an example of the latter, in French law an arbitration is international where it involves a consideration of international trade.[23] This is a codification of French case law and turns on whether the contract in question possesses an international scope, which will generally be the case where it has connections with more than one state.[24] For other jurisdictions the central consideration is often the location of the parties (which is similar to the UNCITRAL Model Law). In Singapore, the *International Arbitration Act,* sets out, unlike France, that an arbitration will automatically be international where at least one party to the arbitration agreement's place of business is outside of Singapore.[25] Alternatively, an arbitration will also be international where the seat is outside of Singapore or where a substantial part of the obligation is to be performed outside of Singapore.[26] India adopts a similar approach, requiring the place of business of at least one party to be outside of India before an arbitration will be international.[27] This approach is also mimicked in Australia, however through an inverse definition in its domestic arbitration acts which provides that an arbitration will be domestic where the place of business of both parties is within Australia.[28]

These definitions provide some useful guidance but expectedly leave some grey areas for determination and can require judicial intervention to determine whether an arbitration is domestic or international in nature. For instance, the Supreme Court of India decided in *TDM Infrastructure Pty Ltd v UE Development India Pty Ltd,*[29] that an arbitration is domestic where both Parties are incorporated within India, regardless of the exercise of any outside control. Ultimately, it seems in most jurisdictions where a distinction is maintained it will be based on the location of the parties or alternatively the subject matter of the dispute.

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[23] Code Civil [C. CIV.] [Civil Code] art. 1492 (Fr.)

[24] Paris Court of Appeal, 29 March 2001, Arbitration Review, 543, Commentary by D. Bureau.

[25] *International Arbitration Act* (1994) s 5(2)(a)) (Singapore)

[26] *Id* s 5(2)(b).

[27] *Arbitration & Conciliation Act 1996* s 2(f) (India).

[2828] *Commercial Arbitration Act* 2010 (NSW) s 3(a) (Australia).

[29] *TDM Infrastructure Private Ltd v UE Development India Private Ltd* (2008) (2) Arb LR 439 (SC).

B. Unitary Regimes

The alternative to the bifurcation of domestic and international arbitration is quite simple, to embrace both under a "unitary regime". This unitary regime applies the same laws to both domestic and international arbitration, and in its purest form, removes any distinction between the two. The United Kingdom, Germany, Mexico, Brazil and Hong Kong provide examples of such regimes.[30]

Hong Kong's adoption of the *Arbitration Ordinance* in 2011, has been one the most recent shifts towards a unitary regime. This was an accumulation of almost fifteen years of research into the reform of arbitration law in Hong Kong. This led to the Hong Kong legislature forming a view that a unitary regime would provide multiple advantages for arbitration in Hong Kong and was crucial its position as a pre-eminent seat for international arbitration. Multiple reasons have been cited for the adoption of a unitary regime. It is often pragmatically noted that the adoption of such a regime would avoid any contention as to whether an arbitration was domestic or international in character.[31] This is considered to be beneficial for international commercial hubs. In Hong Kong, a unitary regime was favoured as its business community is international in character and so such a framework would serve to make its arbitration regime more user friendly. It was also understood that this approach would ensure that those practicing in Hong Kong can operate within a consistent arbitration regime that embraced international best practice.[32] Indeed, similar arguments were made in the United Kingdom and Germany, where both embraced a unitary regime in 1996 and 1998, respectively.[33]

Despite this readiness to embrace such a unitary approach, Hong Kong continues to allow parties to opt-in to additional provisions, which is typical of domestic arbitration regimes. Indeed, to facilitate the shift from domestic to international arbitration regime, up until 2017, Hong Kong applied an 'automatic opt-in' to these provisions where parties provided for 'domestic arbitration' in their arbitration agreements.

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30 Hong Kong Institute of Arbitrators, *Report of Committee on Hong Kong Arbitration Law,* 19 (Hong Kong Institute of Arbitrators, 2003).

31 *Id.*

32 *Id.*

33 *Arbitration Act 1996* (UK); UK Departmental Advisory Committee on Arbitration Law, 1997; German Government, *Bundestagsdruksache* 13/5274.

V. DIVERGING APPROACHES TO PROCEDURE IN DOMESTIC AND INTERNATIONAL ARBITRATION

Having introduced both the dualist and unitary approaches to arbitration frameworks, this paper now turns to consider how the separation of domestic and international arbitration allows states to regulate each kind of arbitration in different ways. This can range from subtle to dramatic differences in approach, which can have varying practical effects. To provide an exceptional example that is illustrative of this point, under the Greek framework in a domestic arbitration if an arbitrator dies or refuses appointment and the arbitral rules do not contemplate a replacement than the arbitration agreement is deemed to have ceased.[34]

A. Additional Grounds for Setting Aside Awards

Generally, legislatures allow for greater court intervention in domestic arbitration. The first area of departure from the UNCITRAL Model Law often takes the form of additional grounds to set aside an award. The UNCITRAL Model Law Article 34(1) provides that an award may be set aside only on limited grounds. These are exhaustively listed and include: where the arbitration agreement was not legally valid;[35] where there was not proper notice of the appointment of an arbitrator or of the arbitration or was unable to present their case;[36] where the matters decided upon where beyond the scope of the arbitration;[37] or where the composition of the arbitral tribunal was not in accordance with the agreement of the parties.[38] These limited grounds also extend to where the subject matter of the award is not arbitrable under the laws of the state or where the award is in conflict with the public policy of the state.[39] The commentary to the Model Law notes that these grounds are logically in parallel with those for refusing enforcement under Article V of the New York Convention.[40] Jurisdictions almost uniformly provide for these grounds to set aside an award rendered from domestic or international arbitrations.

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35 UNCITRAL Model Law Art 34(2)(a)(i).

36 *Id* Art 34(2)(a)(ii).

37 *Id* Art 34(2)(a)(iii).

38 *Id* Art 34(2)(a)(iv).

39 *Id* Art 34(2)(b).

40 UNCITRAL Analytical Commentary, *supra* note 8, para. 35.

However, several jurisdictions also provide for a greater ability for the courts to supervise domestic arbitrations. In Greece the *Code of Civil Procedure* (‘***CCP (Greece)***’) sets out, that in addition to the grounds to set aside an award in the UNCITRAL Model Law, a domestic arbitration award may also be set aside where the standards of judicial review are met. This includes, among other things, where there a contradictory judgment or where a decision is based on false documentation or witness statements.[41]

In India there has been much controversy surrounding the intervention of Courts in the arbitral procedure. This doubt was particularly driven by the 2003 decision of *ONGC v Saw Pipes* (2003) [42] wherein the Indian Supreme Court found that a domestic arbitration award (and potentially an international arbitration award) could be set aside on the grounds of patent illegality. The Court went on to explain that patent illegality arises from a violation of the substantive laws of India or from a contravention of the express terms of the contract between the parties. A line of authority followed *Saw Pipes* and affirmed that a foreign arbitral award could be set aside on the wider grounds as espoused in that case.[43] These developments were widely criticised as an unnecessary expansion to the grounds upon which an award could be set aside in India.[44] However, as Tania Sebastian & Garima Budhiraha Arya explain, ‘it [was] suggested that the principle of least court interference of the award may be suitable for international awards, but that court interference in domestic arbitration should not be restricted’.[45] This view point was seemingly adopted in the 2015 amendments to the *Arbitration and Conciliation Act 1996,* wherein, pursuant to Section 34, domestic arbitration awards may be set aside on the grounds found in the UNCITRAL Model Law and may also additionally be set aside where there exists patent illegality. However, the legislature also clarified that ‘an award shall not be set aside merely on the grounds of an erroneous application of law or be reappreciation of evidence’.[46] Therefore, the threshold at which an award becomes patently illegal remains to be seen. Thus, India provides an example of a jurisdiction where there is a clear dichotomy between the scope of appeal for international and domestic arbitration.

Such dichotomies can also be found elsewhere. In Canada, the respective state arbitration acts allow for parties to seek leave to appeal on a question of law. This generally requires the appeal to be justified by the matters at stake and for the question of law to have significant bearing on

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[41] Code of Civil Procedure (Greece) Article 554.

[42] *ONGC v Saw Pipes* (2003) 5 SCC 705 (India).

[43] *Venture Global Engineering v Satyam Computer Services* (2008) SCALE 214.

[44] Sameer Sattar, ‘Enforcement of Arbitral Awards and Public Policy: Same Concept, Different Approach?’ p.10-11.

[45] Bond law review? P. 172. See also Law Commission of India, Report on the Arbitration & Conciliation (Amendment) Bill 2001, Report No. 176 (2001) 9.

[46] *Arbitration and Conciliation Act 1996* s 2A (India).

the parties' rights.[47] Similar appeal rights can be found where legislatures allow parties in domestic arbitration to opt-in to measures that widen the grounds upon which an award may be set aside. For instance, in Australia and New Zealand, the right to set aside awards due to a manifest error of law remains a possibility under their domestic regulations where parties expressly opt-in to this regime.[48] In France, a similar regime exists where parties to a domestic arbitration can go further and consent to the inclusion of a right of appeal of arbitration awards to the French courts.[49]

These examples highlight the greater willingness of states to intervene in domestic arbitrations. Where such an approach remains prevalent it can hinder public confidence in the arbitral procedure. This is particularly the case, such as in India, where the basis for setting aside an award in domestic arbitration is conflated with its international counterpart. While states may be encouraged to expand their judiciary's supervising functions in matters concerning their private citizens they should remain vigilant that such a course of action does not undermine the efficiency, integrity and finality of the arbitral process.

B. Arbitration & The Public Interest

The difficulties and differences in approaching international and domestic arbitration are epitomised by the interplay between arbitration and the public interest. For instance, the ability to set aside or reject enforcement of an award based on a contravention of public policy, as set out in the UNCITRAL Model Law and New York Convention,[50] reflect the different values held by different states. On the other side of the coin, the arbitrability of disputes, (the question of whether disputes may be referred to arbitration), similarly illustrates these varying attitudes. Edward Torgbor clearly distils this point in his remarks that, 'the doctrinal and contractual principles and requirements of validity and legality that underpin an enforceable arbitration agreement are intertwined with the principles of validity and legality that ensure an enforceable arbitration award'.[51]

There are many reasons why states may deem disputes to be 'non-arbitrable'. Often it is argued that disputes with far reaching public ramifications should be heard in the public domain.[52] States also often fear that a private arbitral tribunal will not apply laws as strictly as public courts.[53]

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47 *Ontario Arbitration Act 1991* c. 17 (Canada); *British Columbia Arbitration Act* s 31 (Canada); *Sattva Capital Corp v Creston Moly Corp* (2014) SCC 53 (Sattva).

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49 Code Civil [C. CIV.] [Civil Code] art. 1489 (Fr.).

50 UNCITRAL Model Law

51 Edward Torgbor, 'Courts and Effectiveness of Arbitration in Africa' Arbitration International (2017) 279-394, 384.

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53 Edward Togbor, p. 385.

Nevertheless, the growth of international commercial arbitration has resulted in courts adopting a pro-arbitration stance in addressing international arbitration agreements and awards. Indeed, in Europe and the United States there has been a shift towards widening the scope of arbitrability. The English Supreme Court has noted:[54]

> The construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter **be decided by the same tribunal.**
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> (author's emphasis)

The question then, is whether such an approach should filter through to domestic arbitration when considering issues of arbitrability and the public interest.

I) Public Policy Ground for Setting Aside an Award

To answer this question, we first turn to consider the 'public policy' ground for the setting aside or non-enforcement of arbitral awards. Often described as an 'unruly horse' which may 'lead you from sound law', the public policy ground for setting aside awards has been the subject of much controversy.[55] Broadly, the ground of public policy allows awards to be set aside where an award conflicts with immutable legal principles. Whether these immutable principles derive from the state's own laws, its own laws as compared against international norms, or transnational norms, has been a matter of much academic consideration.[56]

Across several jurisdictions, including India, it has been suggested that this ground should apply more widely in domestic as opposed to international arbitration. Such a separation is advanced on the premise that a distinction can be made between the public policy of a domestic arbitration and an international arbitration to reflect the role of states in regulating their own citizens and the 'differences in sensibilities across the globe'.[57] An example of judicial endorsement of this approach can be found in the decision of the Supreme Court of India in *Shri Lal Mahal v Progetto Grano SpA* (2010) ('*Shri Lal Mahal*'),[58] which identified that the public policy ground should be construed more narrowly in international arbitration as opposed to domestic arbitration. A similar distinction is also observed in France,[59] where, pursuant to the *Code of Civil Procedure,* a

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54 *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40.

55 *Richardson v Mellish* (1824) 2 Bing 228, 252.

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57 Tina Sebastian & Garima Budhiraja Arya, 'Critical Appraisal of 'Patent Illegality' as a Ground for Setting Aside an Arbitral Award in India, p. 172-173.

58 *Shri Lal Mahal Ltd v Progetto Grano SpA* (2013) Civil Appeal No. 5085

59 IBA Recognition and Enforcement of Awards Subcommittee, 17 October 2014 (Updated 31 March 2015) p. 3-4.

domestic arbitration award may be set aside, 'if the arbitrator has infringed a rule of public interest' going to domestic laws.[60] However, the public policy grounds for setting aside an international arbitration award turns on 'an international public policy of French origin'.[61] It follows from this distinction that the grounds for setting aside a domestic arbitration award are wider than an international arbitration award.[62]

While these arguments are compelling, it should be recalled that the UNCITRAL Model Law incorporated the public policy ground to set aside an award as a failsafe,[63] facilitating the legitimacy of the process. Indeed, this is emblematic of the UNCITRAL Model Law's approach to the judiciary, whose supervision is necessary to 'safeguard the basic element of fairness and impartiality' within the arbitral process.[64] States should therefore be wary of overenthusiastically embracing that failsafe with regards to domestic arbitration. While international and domestic arbitration may have a degree of difference, Sebastian & Budhiraja Arya importantly identify that they are still underpinned by the same central features, chief amongst which, is party autonomy.[65] It follows that there is an argument to be made that states should apply a uniform standard to the UNCITRAL Model Law in both domestic and international arbitrations. Indeed in 2015, the Supreme Court of Greece held that when setting aside domestic arbitration awards the court should consider an international perception of public policy.[66] This meant a consideration based on whether the action is a violation of Greek public policy, as considered in an international law context. This decision confirmed that the grounds for setting aside an award in domestic and international arbitration on the bases of public policy, were identical. The court acknowledged, to apply a different approach to Greek domestic arbitration would create a distinction between domestic and international awards, which was illogical where the arbitrator's powers were the same in both sets of proceedings.

Ultimately, this approach preserves the finality and attractiveness of domestic arbitration, while ensuring that global norms are maintained. For those jurisdictions where there is a high proportion

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60 Code Civil [C. CIV.] [Civil Code] art. 1484(6) (Fr.).

61 by Jean-Francois Poudret & Sebastian Besson, 'Comparative Law of International Arbitration', 822.

62 IBA Recognition and Enforcement of Awards Subcommittee, 17 October 2014 (Updated 31 March 2015) p. 4; C. Seraglini & J. Ortscheidt, *Droit de L'arbitrage interne et international* (2013) 815-817.

63 NEED TO FIND SOURCE.

64 Sameer Sattar, '*Enforcement of Arbitral Awards and Public Policy: Same Concept, Different Approach?"* p. 3.

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66 Supreme Court Judgment 14/2015 (in full plenary)

of both domestic and international arbitrations it also ensures that their legislative framework is clear and uniform and will affirm their pro-arbitration stance.

II) The Arbitrability of Disputes

However, in turning to the closely related question of arbitrability, arguments do exist for maintaining a distinction between international and domestic arbitration. There are several categories of dispute that are considered by many jurisdictions to be non-arbitrable. Indeed, the most universally acknowledged is probably criminal offences.[67] Many other states expressly stipulate that some categories of disputes cannot be referred to arbitration, often including family law disputes, tenancy disputes and labour law. Nevertheless, In the United States and Europe there has been a significant shift towards the arbitrability of disputes in international commercial arbitration, including on occasion to disputes considering matters of public policy.[68]

Commentators have noted in recent times that case law in the United States on the arbitrability of disputes has begun to shift towards conflating domestic and international arbitration. The result of this is that United States court decisions that developed the doctrine of 'universal arbitrability' in international commercial arbitration have been relied upon to widen the category of disputes that may be considered by domestic arbitration. The universal arbitrability doctrine was developed in the decision of *Scherk v Alberto-Culver* in which the Court held that:[69]

> The agreement of the parties in this case to arbitrate any dispute arising out of their international commercial transaction is to be respected and enforced by the federal courts in accord with the explicit provisions of the [FAA].

Conversely, Joseph Mante has noted that in Africa, where a distinction between domestic and international arbitration is maintained, a strong emphasis on non-arbitrability exists in frameworks for domestic arbitrations.[70] It is also suggested that those jurisdictions with a lesser distinction between domestic and international arbitration and a greater focus on international arbitration often have more limited non-arbitrability provisions. Mante hypothesises that this adherence to principles of non-arbitrability in Africa is caused by the foregrounded role of public policy in these considerations and the mistrust of tribunals, creating a desire to 'safeguard national, legal, institutional and economic interests'.[71]

Indeed, the differences in the development of arbitrability across Europe, the United States and Africa does highlight the legitimate concerns of states in indiscriminately applying the

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68 Joseph Mante, p. 281.

69 *Scherk v Alberto-Culver* 417 US 506 (1974).

70 Joseph Mante, *supra* note [X], 294.

71 *Id,* 294.

developments in international arbitration to domestic arbitration. It does appear that states are entitled to apply some hesitancy in adopting the standards of international arbitration to their domestic arbitration regimes. Thus, states must weigh up the benefits of avoiding a dichotomy between international and domestic arbitration against their view of the impact this will have on their legitimate public policy interests.

VI. CONCLUSION

Ultimately, the UNCITRAL Model Law has proven to be immensely valuable in facilitating the effectiveness of international commercial arbitration. England, Germany and Hong Kong all provide examples of unitary regimes that have applied this law to their domestic arbitrations. However, there are equally many states that have maintained a distinction between international and domestic arbitration and who continue to provide different (and often stricter) regulations to the latter. These differences often manifest in extending the supervisory jurisdiction of states courts over domestic arbitrations. However, the central factor underpinning arbitration, regardless of whether it is in a domestic or international context, is party autonomy. It follows that states should be hesitant in unduly limiting this autonomy. However, in approaching issues of public policy and arbitrability, it should be recalled that many of the factors that have seen international commercial arbitrations expansion in this area may not automatically translate into the domestic context. It seems that in seeking to augment arbitrations advantages some states will still have reason to pause before combining their arbitral regimes.