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DOES INTERNATIONAL COMMERCIAL ARBITRATION PROVIDE AN EFFECTIVE REMEDY? AS APPROVED BY POSTGRADUATE STUDIES COMMITTEE

by

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ABSTRACT

The following research report aims to establish whether international commercial arbitration provides an effective remedy to international contracting parties that have elected to have any dispute that arises between them resolved by means of arbitration. The report emphasizes the practicality of international commercial arbitration by accentuating the main advantages that the procedure has to offer to international contracting parties. It also brings to light the challenges that are associated with effectuating and enforcing an international arbitral award. These challenges have the potential to affect the efficacy of the arbitral award in its entirety. The report then focuses on the role and importance of international instruments, such as the New York convention, in international commercial arbitration proceedings, particularly when it comes to the enforcement of international arbitral awards. The report further examines the fruitfulness of such international instruments as well as the benefits that are associated with South Africa being a signatory to the New York convention. The report finds that international treaties and conventions instil credence to international commercial arbitration as it ensures that an effective enforcement mechanism is available for international contracting parties. For international contracting parties, this ensures that parties are able to attain the relief set out in the arbitral award. Thus, rendering the award effective. However, there are certain inadequacies inherent in the New York convention that have surfaced over the years. These inadequacies have the potential to affect the efficacy of international arbitral awards. For instance, the New York convention bestows upon the national courts of contracting states, the ability to set aside and refuse recognition and enforcement of an arbitral award on grounds that the award is non-arbitrable or that the recognition and enforcement of the award will go against the public policy standards of that specific region. The New York convention does not define what constitutes arbitrable matters and neither does it circumscribe the limits on the public policy exception. Therefore, national courts of contracting states are free to interpret the limits of these grounds themselves. This has implications for contracting parties to an arbitration agreement as apart from creating uncertainty, it also affords national courts a certain degree of leverage to set aside and refuse recognition or enforcement of foreign arbitral awards on grounds that may be unbeknown to the contracting parties.

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I. INTRODUCTION

The proliferation of international commercial transactions in contemporary times has resulted in the augmentation of international disputes.[1] International contracting parties frequently resort to international commercial arbitration in instances where transnational commercial disputes arise.[2] There are several reasons which underpin a contracting party's preference for and election of international arbitration as a procedure to resolve commercial disputes.[3] The procedure of international commercial arbitration is commended for its ability to exclude the uncertainties and prejudices that may surface when subjecting an international dispute to the national laws of a country that is adventitious to either of the contracting parties.[4] Furthermore, preference for the procedure of arbitration can also be attributed to the time-effective, flexible and confidential nature of international commercial arbitration.[5]

Despite the many advantages that international commercial arbitration holds, there are concerns regarding the efficacy of the arbitration award that is handed down by the arbitrator or arbitration tribunal at the end of the arbitration procedure.[6] These concerns are predominantly associated with the enforcement of the international arbitral award.[7] An arbitral award is regarded as being tantamount to a judgment that is handed down in a court of law.[8] However, unlike majority of national systems that possess the requisite enforcement mechanisms to ensure that the parties comply with the order handed down by the relevant authority, international arbitration frequently relies on the parties' voluntary compliance with the arbitral award, as the arbitral tribunal or arbitrator who presided over the dispute has no power to enforce the award.[9] Thus, in the event where a losing party fails or refuses to execute or comply with the terms and conditions set out in the international arbitral award, the winning party will have to resort to a national court in pursuit of the enforcement of the arbitral award.[10] This may prove to be unavailing in instances where the national laws of a country fail to afford recognition to the international arbitral award which will ultimately render the arbitral award

[1] Mostafa Fahim Nia *The enforcement of foreign arbitral awards: A closer look at the New York Convention* (2017) xii.
[2] Gary B Born *International arbitration: law and practice* 3 ed (2021) S.1.01.
[3] Julian Nyarko 'We'll see you in…court! The lack of arbitration clauses in international commercial contracts' (2019) 58 *International Review of Law and Economics* 6.
[4] Ibid. See also Born op cit note 2 at S.1.02.
[5] Ibid.
[6] Jacinto D Jimenez 'The enforcement of international arbitral awards' (2017) 61 *Ateneo Law Journal* 56.
[7] Ibid. See also Nia op cit note 1 at xii.
[8] Ibid.
[9] Aditya Gandotra 'Judicial intervention in granting interim measures in international arbitration' (2021) *Conflict Resolution Quarterly* 349.
[10] Ibid at 349 – 350.

unenforceable in the respective territory and nugatory to the affected party.[11] Therefore, in the absence of an effective enforcement system, the arbitral award may prove to be futile to the parties as it will merely amount to words on a paper, thus providing no effective remedy or relief to the winning party.[12]

In response to this dilemma, national and international institutions have promulgated several reform measures that are directed towards the betterment of international commercial arbitration.[13] These reform measures attempt to make the international arbitration system more workable, efficient and effective for transnational contracting parties.[14] The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) is exemplary of such an attempt at an international level.[15] The exact extent to which these reform measures are capable of ameliorating the issues associated with the enforcement of international arbitral awards is debateable.[16]

This report aims to establish whether international commercial arbitration provides an effective remedy to international contracting parties. The report will commence by providing a brief overview of international commercial arbitration. It will then assess whether and if so, how international commercial arbitral awards are capable of being recognised and enforced in foreign states. This report will also attempt to define the term "effective remedy" and it will elaborate on the impact that international treaties and conventions have on international arbitral awards. The report will also discuss the fruitfulness of these international treaties and conventions whilst foregrounding potential inconsistencies that have emanated over the years. This report will conclude by discussing the implications of refusing to afford recognition and/or enforce international arbitral awards in South Africa.

[11] Nia op cit note 1 at xii.
[12] Ibid.
[13] R H Christie 'Arbitration: Party autonomy or curial intervention: The historical background' (1994) 111 *SALJ* 143.
[14] Ibid.
[15] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).
[16] Margaret L Moses 'New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958; Commentary' (2015) *The American Journal of International Law* 246.

II. OVERVIEW: INTERNATIONAL COMMERCIAL ARBITRATION

(a) Defining international commercial arbitration

Arbitration is "… a mode of resolving disputes by one or more third persons who derive their powers from an agreement between the parties and whose decision is binding upon them".[17] The process of arbitration can briefly be summarized as follows: first, where a dispute arises between two parties, who had agreed to resolve any discrepancy by means of arbitration, they may proceed to elect an independent arbitrator or arbitrators from an established tribunal to which the parties will submit their dispute.[18] Secondly, the arbitrator or tribunal will then proceed to hear both sides of the dispute as well as consider the evidence and facts laid down before them.[19] After careful consideration, the arbitrator or tribunal will tender a fair award which must be accepted by both parties.[20] The award is final and binding and the losing party is required to pay for the costs, unless otherwise agreed, and perform in terms of the award.[21] The arbitral award is binding on the parties as they had agreed that it should be.[22] Thus, the award is not binding due to the coercive power of any state but rather it is regarded as binding by virtue of the well-established, internationally recognised principle known as *pacta sunt servanda.*[23] The principle of *pacta sunt servanda* advocates for the sanctity of contracts which strictly obliges contracting parties to honour their contractual obligations.[24]

According to Article 1 (3) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (Model Law), an arbitration will be regarded as international where:

> "(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
>
> (b) one of the following places is situated outside the State in which the parties have their places of business:
>
> (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

[17] Henry P DeVries 'International commercial arbitration: A contractual substitute for national courts' (1982) 42 *Tulane Law Review* 42.
[18] Christian Schulze 'International commercial arbitration: An overview' (2005) 46 *Codicillus* 46.
[19] Ibid. See also De Vries op cit note 17 at 43.
[20] Ibid.
[21] Ibid. See also Born op cit note 2 at S.1.02 para D.
[22] Nigel Blackaby & Constantine Partasides 'An overview of international arbitration' in Alan Redfern & Martin Hunter (eds) *Redfern and Hunter on International Arbitration* 6 ed (2009) 1.
[23] Ibid. See also De Vries op cit note 17 at 75.
[24] Ibid.

> (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
>
> (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country".[25]

Furthermore, the term 'international' encompasses three different definitions.[26] The first relates to the international nature of the dispute.[27] It is accepted that the international nature of a dispute extends to the "…movement of goods or money from one country to another, with significant regard being paid to other elements such as the nationality of the parties, the place of the conclusion of the contract, etc.".[28] The second definition pertains to the nationality of the parties and it is accepted that an arbitration agreement will be regarded as being international in nature where the agreement is "…concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different contracting states".[29] The last definition is associated with the choice of the parties.[30] It is argued that an arbitration will be international in nature where the parties have elected to arbitrate in a neutral third party state that is foreign to either of them or where the subject matter of the arbitration agreement is based on international rules and principles.[31] Therefore, international arbitration encompasses any arbitration that possesses a foreign element and it simply refers to a dispute resolution method that is utilised in instances where a dispute transcends the national borders of a particular country.[32]

The term 'commercial' denotes the existence of a contract that is entered into by merchants or traders in the ordinary course of their business and it embraces all types of business transactions.[33] Relationships that are commercial in nature include, but are not limited to,

> "…any trade transaction for the supply or exchange of goods or services; distribution agreements; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licencing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture

[25] United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1994 (UNCITRAL Model Law): Article 1 (3).
[26] Blackaby & Partasides op cit note 22 at 7.
[27] Ibid.
[28] French Code of Civil Procedure 1981: Articles 1492 – 1507 as cited in Blackaby & Partasides.
[29] European Convention on International Commercial Arbitration 1961 (the Geneva Convention): Article I. 1 (a).
[30] Blackaby & Partasides op cit note 22 at 10.
[31] Ibid.
[32] Richard Garnett 'International arbitration law: Progress towards harmonisation' (2002) 3 *Melbourne Journal of International Law* 402.
[33] Alan Redfern & Martin Hunter *Law and Practice of International Commercial Arbitration* 4 ed (2004) 17 - 18.

and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road".[34]

Therefore, the term international commercial arbitration holistically translates to a dispute resolution mechanism that is apposite for resolving commercial disputes that arise from a business relationship which transcends the national borders of a country.[35]

(b) Elements of international commercial arbitration

There are four distinct elements of international commercial arbitration.[36] These elements are the agreement to arbitrate, the choice of arbitrators, the decision of the arbitrator or tribunal and the enforcement of the award.[37]

Regarding the agreement to arbitrate, national laws as well as international treaties recognise that for there to be a valid arbitration there must be an agreement between the parties to submit to arbitration any dispute which arises.[38] Where no agreement exists between the parties, or where the parties were under some form of incapacity whilst entering into the agreement or if the agreement is not valid under its own governing law, refusal on behalf of the national courts to enforce an arbitral award will be warranted.[39] Therefore, similarly to any other agreement, an agreement to arbitrate must be capable of being enforced at law or else it merely amounts to a statement of intention which has no legal effect.[40] International conventions and treaties such as the New York convention assist in ensuring that international arbitration agreements are given effect to at an international level.[41] However, such conventions and treaties are not self-executing.[42] Thus, contracting states that have ratified the respective treaty or convention, will have to promulgate and implement national legislation to give effect to the convention or treaty.[43] Several national systems and international treaties, such as the New York Convention, require written evidence of the agreement to arbitrate.[44] The agreement to arbitrate is vital as it is indicative of the parties consent to have any dispute, that may surface, resolved by means of arbitration.[45] Among other purposes, the agreement to arbitrate also sets out the powers and

[34] UNCITRAL Model Law supra note 25 at Article 1 Footnote 2.
[35] Redfern & Hunter op cit note 33 at 18. See also Schulze op cit note 18 at 48.
[36] Ibid at 5.
[37] Ibid at 6. See also Born op cit note 2 at S1.01 para A.
[38] Ibid. See also Blackaby & Partasides op cit note 22 at 11.
[39] Ibid. See also Born op cit note 2 at S1.01 para A.
[40] Ibid at 16.
[41] Born op cit note 2 at S1.02 para D.
[42] Nia op cit note 1 at 4.
[43] Ibid.
[44] The New York Convention supra note 15 at Article II (1).
[45] Redfern & Hunter op cit note 33 at 7.

obligations of the arbitrator or tribunal as well as the requisite laws that are to be applied to the proceedings.[46]

The second element of international commercial arbitration pertains to the choice of arbitrators which is noteworthy as unlike court litigation where a judge is appointed by the state to preside over a particular matter, parties to an arbitration agreement are free to choose their own arbitrator or arbitral tribunal who will preside over the matter.[47]

The third distinguishing element of arbitration is the decision of the arbitral tribunal.[48] In instances where the parties are unable to reach a settlement, the arbitrator or arbitral tribunal will be tasked with resolving the dispute by making a decision for the parties which is to be set out in the arbitral award.[49] The arbitrator or tribunal is therefore delegated with the right and obligation to reach a decision that will be binding upon the parties.[50] The power to make a binding decision for the parties distinguishes arbitration from mediation and conciliation which are primarily directed towards achieving a negotiated settlement.[51]

The last element of international commercial arbitration pertains to the enforcement of the arbitral award.[52] The arbitrator's role or tribunal's existence will cease to exist once the arbitral award has been tendered.[53] Despite the award being resultant from a private arrangement that is conducted by a private person or private tribunal, the award nevertheless constitutes a binding decision on the dispute between the parties.[54] Where the award is not complied with voluntarily by the losing party, it may be enforced through legal proceedings.[55]

(c) Advantages of international commercial arbitration

Apart from understanding the basic elements and procedure of international commercial arbitration, it is also worth noting that there are several advantages that may ensue from pursuing arbitration as a method of resolving disputes. The definition and description of the arbitral process seemingly portrays arbitration as a relatively simple and elementary procedure, however there are instances, where international commercial arbitration may transpire into an

[46] Redfern & Hunter op cit note 33 at 8 – 9. See also Born op cit note 2 at S1.01 para A (1).
[47] Ibid. See also Schulze op cit note 18 at 46.
[48]Ibid.
[49] Ibid at 10. See also Schulze op cit note 18 at 46.
[50] Ibid. See also Blackaby & Partasides op cit note 22 at 16 – 17.
[51] Ibid.
[52] Born op cit note 2 at S1.01 para A (3).
[53] Ibid. See also Redfern & Hunter op cit note 33 at 7.
[54] Ibid.
[55] Ibid. See also Schulze op cit note 18 at 46.

exacting procedure that demands reference to several different national systems or rules of law.[56] For instance where a dispute arises between two or more parties, who are situated in different countries, the parties may need to decipher the respective laws or rules which will govern the recognition and enforcement of their agreement to arbitrate.[57] Secondly, the parties may also need to refer to the laws that regulate the actual arbitral process.[58] Thirdly, the laws or rules that the arbitrator or tribunal has to apply to the substantive issues in dispute brought before the arbitrator or tribunal, may also have to be established.[59] Lastly, the laws which govern the recognition and enforcement of the arbitral award, that is tendered by the arbitrator or tribunal, may need to be considered.[60] However, since the parties to an international arbitral agreement reserve the right to elect which laws are to govern the different stages of the arbitral process, they are entitled to select a uniform set of established rules or a single national system to govern the entire process of arbitration thus rendering the procedure simple and uncomplicated.[61]

Arbitration forms part of the law of procedure and it is based on a contractual agreement that exists between two or more, natural or juristic, persons.[62] Furthermore, arbitration also serves as a substitute for court litigation.[63] There are benefits which flow from these characteristics that are specific to arbitration. For instance, in contrast to national court systems which are provided for by the state, arbitration panels will only come into existence once the parties have contractually undertaken to create one.[64] Therefore, the arbitral tribunal, either created or elected by the parties, will derive its rights, powers and duties directly from the arbitration agreement.[65] Party autonomy is an integral part of any arbitration agreement and it affords the parties an appreciable amount of freedom in selecting the preferred place of arbitration, the language that the arbitral proceedings is to be conducted in, the composition of the arbitral panel, the confidentiality of the proceedings and the law that is to be applied during the arbitral proceedings.[66] In bestowing upon the parties, the power to select the preferred, applicable law that is to govern the arbitration procedure, contracting parties are able to avoid issues such as

[56] Ian Glick & Niranjan Venkatesan 'Choosing the law governing the arbitration agreement' in Neil Kaplan & Michael Moser (eds) *Jurisdiction, admissibility and choice of law in international arbitration* (2018) at 131.
[57] Redfern & Hunter op cit note 33 at 1 – 2. See also Blackaby & Partasides op cit note 22 at 2.
[58] Ibid. See also Born op cit note 2 at S1.03.
[59] Nyarko op cit note 3 at 6.
[60] Ibid. See also Redfern & Hunter op cit note 33 at 1 and Born op cit note 2 at S1.03.
[61] Ibid.
[62] De Vries op cit note 17 at 43.
[63] Ibid. See also Nyarko op cit note 3 at 6 and Schulze op cit note 18 at 48.
[64] Garnett op cit note 32 at 402.
[65] Ibid. See also Born op cit note 2 at S1.02 at para F.
[66] Garnett op cit note 32 at 402

nationalistic favouritism.[67] Additionally, international contracting parties are able to select laws and rules that are already known to them and that they are well acquainted with, which addresses the concerns surrounding the subjugation of either of the contracting parties to foreign laws, that they are unfamiliar with, in pursuit of a claim that arises from the contract that exits between the parties.[68] Furthermore, contrary to national court systems where a judge is appointed by the state to hear a matter brought before the court, international contracting parties, to an arbitration agreement, are afforded the power to choose their preferred arbitrator or tribunal.[69] This serves to be advantageous for international contracting parties as they are able to select an arbitrator or panel that is comprised of experts in a particular field and who are equipped with knowledge of trade usages and customs that are specific to a particular industry, enabling the arbitral proceedings to be tailored to the needs of the parties and conducted in an expedited manner.[70] An additional ramification that may ensue as a result of subjecting a dispute to the national laws of a country is that various national court systems are already over-burdened with pre-existing matters that have yet to be determined, thus international contracting parties who seek relief from a national court may experience delays in attaining the relief sought.[71] Therefore, relying on a national court to resolve a dispute between international contracting parties, which may be novel to the national court and require skilled expertise, may result in the dispute being hauled on for prolonged periods of time which will incur excessive costs.[72] International arbitration, on the other hand, is often sought out for its ability to provide alacritous relief which is propitious for international contracting parties that are in need of a quick yet carefully considered remedy.[73]

Therefore, there are several advantages that are inherent and specific to arbitration which renders it a lucrative and appealing dispute resolution mechanism for international commercial contracting parties that are situated in different countries and who fear being subjected to a foreign judicial system that they are unfamiliar with.[74] However, similarly to the imperfections inherent in several national legal systems, international commercial arbitration also possesses

[67] Clyde Croft 'The temptation of domesticity: An evolving challenge in arbitration' in Neil Kaplan & Michael Moser (eds) *Jurisdiction, admissibility, and choice of law in international arbitration* (2018) at 57.
[68] Ibid at 144 - 145.
[69] Born op cit note 2 at S1.02 at para-F.
[70] Ibid. See also Nyarko op cit note 3 at 6.
[71] Ibid. See also Blackaby & Partasides op cit note 22 at 25 – 26.
[72] Ibid.
[73] Ibid. See also Blackaby & Partasides op cit note 22 at 43.
[74] Garnett op cit note 32 at 402.

certain flaws.[75] It is contended that upon conclusion of the arbitral proceedings and promulgation of the arbitral award, majority of the issues associated with resorting to the procedure of international commercial arbitration arise as in instances where the losing party fails or refuses to comply with the arbitral award, the winning party frequently encounters several impediments in attempting to enforce the arbitral award.[76]

III. ENFORCING AN INTERNATIONAL ARBITRAL AWARD

(a) Definition of an arbitral award

An agreement to arbitrate entails not only an agreement to partake in any arbitral proceedings but also an agreement to execute any resulting arbitral award.[77] There is no universal definition of the term 'arbitral award'.[78] However, there have been several attempts in defining what constitutes an 'arbitral award'.[79] From these definitions, four main features regarding an arbitral award, have surfaced.[80] First, an arbitral award "concludes the dispute…[and] has a *res judicata* effect between the parties".[81] Secondly, an arbitral award discards the parties' respective claims.[82] Thirdly, an arbitral award may be confirmed through recognition and enforcement.[83] Lastly, an arbitral award may be challenged in the courts of the place of arbitration.[84] It is also worth noting that an arbitration award is synonymous to a court judgment and as a result it is endowed with the same functionality.[85] The reason for affording an international arbitral award the same echelon as that of a court judgment is to emphasize that arbitration is capable of producing a powerful outcome that is tantamount to a court judgment

[75] Christopher Style QC and Stephan Balthasar 'Enforcing international arbitral awards: Pitfalls and strategies' (2012) 6 *Dispute Resolution International* 3.
[76]Ibid. See also Nyarko op cit note 3 at 6.
[77] Redfern & Hunter op cit note 33 at 23.
[78] Nia op cit note 1 at 9.
[79] Loukas A Mistelis 'Award as an investment: The value of an arbitral award or the cost of non-enforcement' (2013) 28 *International Centre for Settlement of Investment Disputes Review* 4.
[80] Ibid.
[81] Artan Spahiu 'Types of international arbitral awards and their effects, focussing on two case studies: arbitral awards on case "La Petrolifera Italo-Rumena" vs Republic of Albania (2007) and arbitral award on case "DIA Ltd. Vs OSHEE sh.a" (2005)' (2019) 9 *Juridical Tribune* 61.
[82] Ibid. See also Born op cit note 2 at S1.01 at para-A 3.
[83] Spahiu op cit note 81 at 61. See also Redfern & Hunter op cit note 38 at 23.
[84] Pranas Mykolas Mickus 'International commercial arbitration – enforcement of arbitral awards revisited' (2019) 5 *International Comparative Jurisprudence* 159.
[85] Ibid. See also Redfern & Hunter op cit note 33 at 23.

and the process of arbitration does not merely exist to provide a poor alternative to court litigation.[86]

(b) Effectuating an arbitral award

In practice, international arbitral awards are effectuated by virtue of the losing party's voluntary compliance.[87] Despite the binding nature of the international agreement to arbitrate, there are circumstances where a party will refuse to voluntarily comply with the international arbitral award.[88] The refusal on behalf of the losing party to execute the international arbitral award, renders the entire arbitral proceeding ineffective and futile, as the winning party is simply left with an award that amounts to words on paper.[89] Where non-compliance with the arbitral award ensues, the winning party will merely be left off in the same, or arguably, even worse off position than they were initially in prior to commencing the arbitral proceedings, as apart from the wasted costs, time and effort that was expended, the winning party is left with an award that provides no consolation to him/her.[90] Therefore, it is widely accepted that the effectiveness of international commercial arbitration is contingent upon whether the arbitral award can be enforced against the losing party.[91] The enforceability of the arbitral award bestows credence to the entire arbitral process, and it vindicates the cost, time and effort that the parties have invested into the dispute resolution process.[92]

Where the losing party fails or refuses to carry out the arbitral award, the winning party may pursue enforcement through legal proceedings at a national level.[93] Since international commercial arbitration is associated with parties that are of different nationalities or who have their places of business in different countries or who have elected to arbitrate in a country that is not their own, enforcing the international arbitral award, will necessitate that the winning party resort to the legal proceedings of recognition and enforcement, which requires the support of national courts.[94]

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[86] Mickus op cit note 84 at 159.
[87] Nia op cit note 1 at 6.
[88] Inae Yang 'A comparative review on substantive public policy in international commercial arbitration' (2015) 70 *Dispute Resolution Journal* 49 – 50.
[89] Nia op cit note 1 at xi.
[90] Ibid.
[91] Ibid at 6. See also Born op cit note 2 at S1.02 at para D.
[92] Mistelis op cit note 95 at 2 – 3.
[93] Redfern & Hunter op cit note 33 at 23. See also Nyarko op cit note 3 at 8 – 9.
[94] Nia op cit note 1 at 6.

(c) Recognition of international arbitral awards

An arbitral award must first be recognized prior to it being capable of being enforced.[95] Recognition may be defined as a defensive mechanism.[96] Thus, the winning party may rely on recognition to prove that the matter has already been resolved by an arbitral award and is no longer subject to litigation or the winning party may request the enforcement to acquire the sum granted by the award.[97] For the defence of recognition to succeed, the winning party will have to present the arbitral award to the national court and request that the court afford the award recognition in order to render it valid and binding upon the parties.[98] The winning party may also rely on recognition to prevent the losing party from acquiring another arbitral award that relates to the same dispute and which may potentially contradict the initial award.[99]

(d) Enforcing an international arbitral award

Enforcement refers to a judicial process that takes place after recognition, and which compels the losing party to execute the arbitral award.[100] Enforcement is usually sought after the losing party refuses to execute the award voluntarily.[101] Thus, enforcement enables the winning party to request a court to enforce the award against the losing party's assets.[102] The most effective way, for the winning party, to carry out enforcement is by way of acquiring enforceable judgment against the losing party in a court of law.[103] Therefore, the winning party will have to approach the court of the country where the losing party resides or has its place of business or where the losing party has assets that may be seized.[104] Where enforcement is sought before a national court, the court plays a positive role by taking action against the property which belongs to losing party either by means of seizing the property or by expropriating the losing party's property.[105]

[95] Nia op cit note 1 at 7.
[96] Ibid.
[97] Ibid. See also Yang op cit note 88 at 49 – 50.
[98] Ibid.
[99] Ibid. See also Blackaby & Partasides op cit note 22 at 32.
[100] Jonathan Hill 'The significance of foreign judgments relating to an arbitral award in the context of an application to enforce the award in England' (2012) 8 *Journal of Private International Law* 159 – 160.
[101] Ibid. See also Nia op cit note 1 at 7.
[102] Ibid. See also Yang op cit note 88 at 49 – 50.
[103] Redfern & Hunter op cit note 33 at 23 – 24.
[104] Ibid. See also Hill op cit note 100 at 160.
[105] Nia op cit note 1 at 7.

(e) Defining an "effective remedy"

It is apparent that the effectiveness of an arbitral award is profoundly contingent on the ability of the party, who seeks enforcement of the award, to attain enforcement of the arbitral award.[106] The party who seeks the enforcement of a foreign arbitral award in a state, other than that where the arbitral award was tendered, may encounter certain encumbrances as the process of attaining enforcement in a foreign state often proves to be laborious and convoluted.[107] For instance, foreign states may be reluctant to enforce an arbitral award where such award is tainted with illegality.[108] In South Africa, the Constitutional Court's reasoning in the case of *Cool Ideas 1186 CC v Hubbard and Another* is exemplary of this predicament as the court held that a basic principle of South African law is that where "… an award is tainted by illegality, it may not be made an order of court and may not be enforced in our courts".[109] Thus, the international arbitral award must comply with the relevant legal rules and principles of the respective territory, where enforcement is sought, in order for the award to be regarded as enforceable. Compliance with the relevant legal rules and principles of a foreign state demands that the party, who seeks enforcement of the award, possess the requisite knowledge of the legal rules and principles of the state where enforcement is sought.[110] Thus, attaining enforcement of a foreign arbitral award may prove to be tedious and difficult. In addition to this, the party against whom enforcement is sought must also possess sufficient assets, in the country where enforcement is sought, in order to ensure that there is and will be some form of security in the event of non-compliance with the arbitral award.[111] Thus, where the losing party does not possess assets that are sufficient to settle the claim by the winning party, as per the arbitral award, there is no effective remedy for the winning party and seeking enforcement of the arbitral award will be nugatory as the losing party will not be able to materially compensate the wining party for the pecuniary losses suffered.[112] Therefore, in order for a remedy to be regarded as effective, the award must be capable of being enforced in the respective state where the losing party possesses sufficient assets that are capable of being executed to satisfy the losses that were suffered by the winning party.

[106] 2014 (4) SA 474 (CC) at para 56. See also Blackaby & Partasides op cit note 22 at 23 – 24.
[107] Ibid. See also Yang op cit note 88 at 83.
[108] Yang op cit note 88 at 51.
[109] *Cool Ideas* supra note 106 at para 77.
[110] Hill op cit note 100 at 159.
[111] Blackaby & Partasides op cit note 22 at 23 – 24.
[112] Ibid. See also Hill op cit note 100 at 160.

(f) Role of national courts

Since the effectiveness of international arbitration depends on whether the arbitral award can be enforced against the losing party, it is safe to say that national courts play a salient role by ensuring that an international commercial arbitration has an effective enforcement system.[113] Nevertheless, what also ensues from resorting to national courts in pursuit of recognizing and enforcing an international arbitral award is that the laws of the country where the arbitral award was made or the laws of the country where the arbitration was held may influence the legality, validity and effectiveness of the arbitral award.[114] For instance, in several Islamic Middle Eastern countries religious considerations greatly influence the acceptance and operation of international commercial arbitration.[115] Thus, among several other variables, religious elements which may be embedded in the national laws of several countries has the capacity to affect the substantive or procedural evaluation of the arbitral process.[116] This may result in the national courts of a particular country refusing to recognise and enforce a foreign arbitral award due to it being in conflict with the country's national domestic laws which is predicated on, and instilled with such variables.[117] Furthermore, states may also be reluctant to accept and afford recognition to foreign arbitral awards that were concluded in countries where political or legislative differences prevail or where a great degree of hostility exists between the two states.[118] This predicament clouds the process of international commercial arbitration with uncertainty and clothes it with a degree of ineffectiveness, ultimately resulting in a lack of confidence for the process.[119] To address this dilemma, the international business community and international organisations have formulated several conventions and treaties which seek to imbue the process of international commercial arbitration with certainty, uniformity, stability and predictability as well as restore a greater sense of confidence in the procedure.[120] These treaties and conventions assist international contracting parties in founding jurisdiction in states which refuse to recognize and enforce a foreign arbitral award in an antagonistic and arbitrary or negligent and volitional manner.[121]

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[113] Nia op cit note 1 at 6.
[114] Mistelis op cit note 79 at 7.
[115] Mark Wakim 'Public policy concerns regarding enforcement of foreign international arbitral awards in the Middle East' (2008) 21 *New York International Law Review* 3.
[116] Ibid. See also Yang op cit note 88 at 55 – 56.
[117] Ibid at 50.
[118] Mistelis op cit note 79 at 8.
[119] Wakim op cit note 115 at 5. See also Nyarko op cit note 3 at 8.
[120] Ibid.
[121] Mistelis op cit note 79 at 1.

IV. IMPACT OF INTERNATIONAL TREATIES AND CONVENTIONS ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

(a) The Geneva Treaties

Prior to the enactment and subsequent promulgation of the New York convention, the Geneva treaty's assisted parties to an international commercial arbitration by simplifying the recognition and enforcement of foreign arbitral agreements and awards.[122] The primary goal of the Geneva treaties was to harmonize different national arbitration laws, ultimately rendering the process of international commercial arbitration a simple yet effective dispute resolution mechanism.[123] The Geneva Protocol on Arbitration Clauses (Geneva Protocol) obliged contracting states to recognize the validity of certain arbitration agreements and agree that their national courts will remit international contracting parties to arbitration.[124] Conversely, the Geneva Convention on the Execution of Foreign Arbitral Awards (Geneva convention) obliged contracting states to enforce arbitral awards that were made in another state.[125] The Geneva treaties did not have a considerable impact on international commercial arbitration as they contained certain procedural requirements, such as the '*double exequatur*' rule, that proved to be exceptionally extraneous for the party seeking enforcement of the arbitral award to prove.[126] Consequently, the Geneva treaties were replaced by the New York convention.[127]

(b) The New York Convention

The New York convention entered into force on the seventh of June 1959. [128] In the United States of America, the court in *Scherk v Alberto-Culver Co* affirmed that the primary purpose of the New York convention is to "…encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries".[129] The New York convention proves to be a successful attempt on behalf of the

[122] Julian Cohen 'Practical issues to consider in relation to enforcing and resisting enforcement of international arbitration awards' (2006) 8 *Asian Dispute Resolution* 22.
[123] Ibid at 23.
[124] Geneva Protocol on Arbitration Clauses 1923: Article 1.
[125] Geneva Convention on the Execution of Foreign Arbitral Awards 1927: Article I.
[126] Brian Sampson 'Staying the enforcement of foreign commercial arbitral awards: A federal practice contravening the purpose of the New York convention' (2001) *26 Brooklyn Journal of International Law* 1843.
[127] Gary B Born 'The New York Convention: A self-executing treaty' (2018) 40 *Michigan Journal of International Law* at 117.
[128] Albert Jan Van den Berg *The New York Convention of 1958: An Overview* (2008) 60.
[129] *Scherk v Alberto - Culver Co.* (1974) 417 U.S. 506 (United States Supreme Court), Footnote 15.

International Chamber of Commerce (ICC), at providing a basic framework, that assists parties to an international commercial arbitration, in attaining enforcement of their arbitration agreement and international arbitral award.[130] The convention is greatly favoured among nations and there are currently one hundred and sixty eight state parties who have ratified the convention.[131] The New York convention regulates the recognition and enforcement of international arbitral awards and arbitration agreements.[132] Thus, where a country is a signatory to the New York convention, the convention will apply to all foreign or international arbitration agreements as well as all foreign or non-domestic arbitral awards.[133]

The provisions contained in the New York convention are strongly premised on the principle of party autonomy and it embodies a strong resistance to intervention by the national courts of contracting states.[134] In essence, the New York convention contemplates two basic actions.[135] First, Article II of the New York convention obliges the national courts of contracting states to recognize arbitration agreements and refer the parties to arbitration, pursuant to their agreement.[136] Accordingly, Article II of the New York conventions lays out a mandatory enforcement procedure for arbitration agreements that is conditional upon a narrow exception.[137] Thus, by virtue of Article II of the convention, a national court situated in a contracting state, must enforce an arbitration agreement if such agreement falls within the scope of Article II.[138] Moreover, a national court will only be exempt from enforcing the arbitration agreement where the "…said agreement is null and void, inoperative or incapable of being performed".[139] Article II of the convention provides no alternative defences or residual discretion not to enforce an arbitration agreement, for national courts in contracting states.[140] The narrow exceptions contained in Article II of the convention is indicative of the international community's attempt directed towards reinforcing the international arbitral process by circumscribing the influence of national laws in preventing the enforcement of

[130] Born op cit note 127 at 117.
[131] New York Arbitration Convention 'Contracting States' available at *https://www.newyorkconvention.org/countries*, accessed on 21 June 2021.
[132] Linda Silberman 'The New York convention after fifty years: Some reflections on the role of national law' (2009) 38 *Journal of International and Comparative Law* 26.
[133]Ibid. See also Born op cit note 127 at 119.
[134] Garnett op cit note 32 at 405.
[135] Van den Berg op cit note 128 at 39.
[136] New York Convention supra note 15 at Article II.
[137] Garnett op cit note 32 at 405.
[138] New York Convention supra note 15 at Article II (I).
[139] Ibid at Article II (3).
[140] Garnett op cit note 32 at 405.

international arbitral agreements.[141] The second action contemplated by the New York convention compels contracting states to enforce arbitral awards that were issued in other contracting states unless refusal to recognize and enforce an arbitral award is justified in terms of any one of the seven grounds listed in Article V section 1 or section 2 of the convention.[142]

The grounds contained in Article V of the New York convention may be broadly categorised into two categories.[143] The first category relates to the grounds listed in Article V (1) (a) to (d) of the New York convention which may be impetrated by the party against whom enforcement is sought.[144] The second category pertains to the grounds listed in Article V (2) which may be invoked by the national court of a contracting state where the recognition and enforcement of an arbitral award is sought.[145] The first category primarily seeks to protect the interests of the party against whom enforcement is sought whilst the second category is aimed at safeguarding the fundamental interests of the country where enforcement is sought.[146] The grounds upon which recognition and enforcement of foreign arbitral awards may be denied broadly include, incapacity of either party to the arbitration agreement, non-arbitrability of the matter, lack of fairness during the arbitration proceedings, where enforcement or recognition would have the effect of contravening public policy of the forum state and breach of due process.[147] The defences against recognition and enforcement of foreign arbitral awards contained in Article V of the New York convention are narrowly drawn and primarily relate to procedural deficiencies that may have surfaced during the arbitral process, as opposed to errors of substantive law or errors with the merits of the case that may also have arisen.[148] Similarly to Article II of the convention, Article V contains no further residual discretion for national courts of contracting states not to enforce an arbitral award.[149] Thus, enforcement is mandatory for the national courts of contracting states unless one of the listed grounds in Article V are applicable.[150] The grounds laid out in Article V serve as an actuating factor to ensure that national courts approach

[141] Garnett op cit note 32 at 405. See also Born op cit note 127 at 120.
[142] New York Convention supra note 15 at Article III.
[143] Faizal Kurniawan 'An annulled award cannot be enforced under the New York Convention' (2017) 17 *Jurnal Dinamika Hukum* 174.
[144] Ibid. See also Born op cit note 127 at 124.
[145] Ibid.
[146] Ibid. See also Silberman op cit note 132 at 26 – 27.
[147] New York Convention supra note 15 at Article V (1) (a) – (b) & V (2) (a) – (b).
[148] Garnett op cit note 32 at 405.
[149] Ibid.
[150] Ibid. See also Born op cit note 127 at 124.

the defences, contained in Article V, with a pro-enforcement predisposition by ultimately limiting their power to reopen a case based on the merits.[151]

Additionally, the scope of the convention extends to all arbitral awards that were produced in the territory of a state "other than the state where the recognition and enforcement of such awards are sought" as well as to awards "not considered as domestic awards in the state where their recognition and enforcement are sought".[152] Therefore, the New York convention imposes a public international obligation on contracting states to recognize arbitration agreements as well as enforce international arbitral awards.[153] Article III of the New York convention contains a practical instruction that is coupled with a safeguard against discrimination as the provision prohibits national courts of contracting states to impose "…substantially more onerous conditions or higher fees or charges on the recognition or enforcement or arbitral awards…than are imposed on the recognition or enforcement of domestic arbitral awards".[154] Thus, contracting states are urged to treat international arbitral awards similarly to a decision that is made by a national court situated within the respective contracting states territory.[155] However, when signing, ratifying or acceding to the convention, state parties are permitted to submit reservations in order to limit the scope of the New York convention.[156] The first reservation embodies the principle of reciprocity which provides that the signing state will only afford recognition to and enforce arbitral awards that were made in the territory of another contracting state.[157] Whereas, the second reservation enables a state to apply the convention only to those legal relationships that are regarded as commercial under the law of that state.[158]

(c) Importance of international treaties and conventions

Considering the above, it is apparent that arbitral awards that are rendered to settle disputes between parties who are from different countries require international recognition and enforcement procedures.[159] In the absence of international recognition or enforcement procedures, dispute resolution mechanisms, such as international commercial arbitration, lack

[151] Garnett op cit note 32 at 405.
[152] New York Convention supra note 15 at Article I.
[153] Mistelis op cit note 79 at 7.
[154] New York Convention supra note 15 at Article III.
[155] Mistelis op cit note 79 at 7.
[156] New York Convention supra note 15 at Article I (3).
[157] Ibid at Article I (3).
[158] Ibid.
[159] Kurniawan op cit note 143 at 172.

credibility and proves to be unavailing for the parties.[160] International treaties and conventions, particularly the New York convention, play an essential role in this regard.[161] International treaties and conventions provide a basic set of rules and a uniform framework that obliges national courts of contracting states to recognize and enforce international arbitration agreements and international arbitral awards.[162] Therefore, international treaties and conventions enable inter-jurisdictional awards to be made and enforced which bestows a great degree of credence and effectiveness to the entire arbitral process.[163] International treaties and conventions, by imposing mandatory obligations on contracting states to recognize and enforce foreign arbitral agreements and awards, enables parties to an arbitration agreement, particularly the winning party, to attain the relief that is set out in the arbitral award.[164] Therefore, international treaties and conventions provide parties to international commercial arbitration with an enforcement mechanism.[165] Thus, the winning party is able to acquire relief by commencing recognition and enforcement proceedings in a national court that is situated in a foreign country where there are sufficient assets belonging to the losing party and which is capable of being executed to satisfy the loss sustained by the winning party.[166] Consequently, where enforcement is granted in a foreign state, compliance with the arbitral award is necessitated, ultimately providing an effective remedy to the winning party.[167] International treaties and conventions therefore play a vital role in international commercial arbitration as they serve as an enforcement mechanism that assists international contracting parties in attaining the relief set out in the arbitral award.

(d) South Africa's position

South Africa acceded, without reservation, to the New York convention on the 1st of August 1976.[168] Additionally, South Africa has recently enacted the International Arbitration Act 15 of 2017[169] (International Arbitration Act) which espouses the UNCITRAL Model Law, and which gives effect to the provisions contained the New York convention.[170] It is apparent from

[160] Bartlomiej Orawiec 'The public policy exception under the New York Convention on the recognition and enforcement of foreign arbitral awards (The UK perspective)' (2016) 21 *Comparative Law Review* 54.
[161] Ramona Martinez "Recognition and enforcement of international arbitral awards under the United Nations Convention of 1958: The "refusal" provisions' (1990) *The International Lawyer* 493.
[162]Ibid.
[163] Kurniawan op cit note 143 at 172.
[164] Martinez op cit note 161 at 493.
[165] Ibid.
[166] Blackaby & Partasides op cit note 22 at 56.
[167] Ibid.
[168] Schulze op cit note 18 at 56.
[169] International Arbitration Act 15 of 2017 (International Arbitration Act).
[170] Ibid at s 3 (b).

the aforesaid that there are several advantages that ensue from acceding to international treaties and conventions. For instance, contracting states are obliged to afford recognition to written arbitration agreements as well as enforce foreign arbitral awards, provided that the agreement or award is legally valid within the respective territory and that the recognition and/or enforcement of such agreement or award will not violate the public policy norms of the state. Thus, by virtue of South Africa being a signatory to the New York convention, international contracting parties who seek to enforce their international arbitration agreement or international arbitral award against a party, who possesses property within the Republic, can be reassured that the national courts of the Republic will recognise and enforce an agreement to arbitrate and/or foreign arbitral award unless, of course, one of the exceptions, contained in the New York convention, apply. Therefore, South Africa's accession to the New York convention proves to be greatly beneficial as it provides a large degree of assistance and assurance to parties who seek the recognition or enforcement of an international arbitration agreement or international arbitral award within the Republic.

V. EFFICACY OF INTERNATIONAL ARBITRAL AWARDS AND POTENTIAL SOLUTIONS THAT MAY ENHANCE THE EFFICACY OF THE ENFORCEMENT OF INTERNATIONAL COMMERCIAL ARBITRAL AWARDS

The New York convention proves to be a success in providing a basic framework that ensures the enforcement of international arbitration agreements and international arbitral awards for the international community.[171] However, it goes without saying that no matter how carefully a particular legal instrument is drafted, gaps and inconsistencies are bound to surface during its existence and operation.[172] It is agreed that an important feature of a successful international convention is the autonomous and uniform interpretation of the convention by national courts.[173] Regarding the New York convention, international standards have emerged at several points.[174] For instance Article II (3) of the New York convention that contains the exceptions against enforcement of arbitration agreement, is widely understood to refer to conventional contractual defences and not public policy concerns.[175] Nevertheless, the structure of the New Yok convention allows for national laws to play a relatively large role in its application and

[171] Silberman op cit note 132 at 26.
[172] Ti Seng Wei, Edward 'Why egregious errors of law may yet justify a refusal of enforcement under the "New York Convention" (2009) *Singapore Journal of Legal Studies* 595 – 596.
[173] Silberman op cit note 132 at 26.
[174] Ibid.
[175] Ibid. See also Moses op cit note 16 at 245.

interpretation.[176] For instance, regarding the substantive defences to enforcement as contained in Article V(2)(a) and (V)(2)(b) of the New York convention that relate to the arbitrability of the matter and public policy, national courts are afforded a prominent role in defining the scope of such defences.[177] Moreover, the New York convention refers the parties to domestic laws that are already in place with respect to enforcing the arbitral award.[178] Thus, where the procedure to enforce a domestic arbitral award is laborious, the New York convention will not ameliorate the difficulties experienced at national level nor will it suffice in making the foreign arbitral award any easier to enforce.[179]

(a) Article V (2) (a) of the New York Convention: arbitrability of the matter

Regarding the Article V(2)(a) defence against enforcement, it is worth noting that an enforcing court may raise the exception on its own accord and as such they are empowered to decide on the arbitrability of the dispute under local law.[180] Thus, a national court may refuse to enforce a foreign arbitral award where the grounds of a dispute cannot be resolved by arbitration under the domestic laws of that enforcing state.[181] The *Libyan American Oil Co. (LIAMCO) v Libyan Arab Republic* case is exemplary of this predicament.[182] The *LIAMCO* case concerned the nationalization of LIAMCO's rights under petroleum concession agreements that were afforded to LIAMCO, an American company, prior to Libya's nationalization of its oil sector in 1973.[183] In response to Libya's nationalization of its oil sector, LIAMCO initiated arbitration proceedings under its concessions agreement requesting the reinstatement of its concessions or alternatively a claim for damages.[184] An arbitral award was rendered in Geneva in LIAMCO's favour.[185] LIAMCO attempted to enforce the arbitral award in the United States, however, Libya opposed enforcement by claiming sovereign immunity as well as the fact that nationalisation is not capable of being determined by arbitration (non-arbitrability).[186] The court dismissed Libya's sovereign immunity claim on the grounds that the Libyan government agreed to the arbitration proceedings being governed by a foreign law, therefore Libya had

[176] Margaret L Moses 'Public policy under the New York Convention: National, international and transnational' in Katia Fach Gomez & Ana M. Lopez-Rodriguez (eds) *60 Years of the New York Convention: Key issues and future challenges* (2019) 170.
[177] Ibid.
[178] Ibid. See also Martinez op cit note 161 at 516.
[179] Martinez op cit note 161 at 506.
[180] Ibid.
[181] Ibid. See also Born op cit note 127 at 124.
[182] *Libyan American Oil Company (LIAMCO) v Libya* 1978 *ILM* 3 at 1175.
[183] Ibid.
[184] Ibid.
[185] Ibid.
[186] Ibid at 1178.

waived its sovereign immunity.[187] Regarding the second defence, namely the non-arbitrability of the matter, the court accepted Libya's argument that the oil concessions were an act of state and that nationalization laws have the effect of abolishing all terms of the concessions.[188] In light of this, the court held that it could not enforce the award as in compelling arbitration proceedings between Libya and LIAMCO, it would result in reviewing the validity of the nationalization which would violate the act of state doctrine.[189] The *LIAMCO* case is indicative of instances where a national court is afforded discretion, in terms of Article V(2)(a) of the New York convention, to refuse enforcement of a foreign arbitral award in circumstances where the dispute cannot be settled by arbitration under the domestic laws of the enforcing state.[190] The defence of non-arbitrability may differ amongst nations due to the national laws of contracting states being unique from each other.[191]

(b) Article V (2) (b) of the New York Convention: public policy

The defence of public policy as contained in Article V(2)(b) of the New York convention also raises several concerns.[192] The defence entails that recognition and enforcement of a foreign arbitral award may be denied in instances where it would be contrary to the public policy of the enforcing country.[193] There is no exact scope or guideline provided by the New York convention as to what constitutes "public policy" and the boundaries of such is dependent on the laws of each particular state.[194] Thus, the interpretation of public policy rests on the national courts of contracting states which may be influenced by political, social and religious matters.[195]Accordingly, the concerns regarding the public policy ground that is contained in the New York convention, are predicated on the supposition that national courts may feel more inclined to afford a wide interpretation to the term, particularly when one of the parties is a national of the enforcing state, thus, potentially enabling nationalistic favouritism to occur.[196] Practice has shown that when interpreting the scope of Article V(2)(b) of the New York convention, national courts have articulated standards that are vague and subjective.[197] Article V(2)(b) of the New York convention creates a potential loophole for national courts of

[187] *LIAMCO* supra note 182 at 1179.
[188] Ibid.
[189] Ibid.
[190] Martinez op cit note 161 at 508.
[191] Ibid.
[192] Ibid. See also Orawiec op cit note 160 at 55.
[193] Ibid. See also Moses op cit note 176 at 171.
[194] Martinez op cit note 161 at 508.
[195] Wakim op cit note 115 at 50.
[196] Ibid at 44. See also Orawiec op cit note 160 at 78.
[197] Martinez op cit note 161 at 516.

contracting states to unjustifiably and arbitrarily refuse recognition and enforcement of foreign arbitral awards.[198]

(c) Issues associated with affording national courts the discretion to ascertain the arbitrability of a matter or decipher the limits of public policy

In affording national courts the ability to determine the scope and interpretation of issues such as whether enforcement should be denied due to the matter being classified as non-arbitrable in the respective state or whether enforcement of a foreign arbitral award would amount to violation of public policy, is a major drawback of the New York convention.[199] The provisions of the New York convention, which enable the intervention of national courts to assist with effectuating the provisions of the New York convention, creates a lacuna that ultimately allows national courts of contracting states to influence the recognition and enforcement of foreign arbitral awards which not only creates uncertainty for the international community but which also has the potential to hinder the effectiveness of international commercial arbitration.[200] The varying and broad interpretations of the public policy defence weakens the strength and effectiveness of the New York convention and casts doubt on the effectiveness of international arbitration.[201] The above predicaments have greatly affected the New York conventions' ability in attaining and providing a truly international standard for international commercial arbitration.[202] Additionally, the inadequacies, as elaborated on above, have the potential to affect the efficacy of international arbitral awards as it enables national courts, who may have preconceptions of their own regarding certain matters brought before them, to determine whether the recognition or enforcement of an arbitral award may be refused.[203] Refusal to recognize or enforce a foreign arbitral award may also be easily justified in terms of the public policy ground as there are no limits imposed on such grounds by the New York convention and national courts in contracting states are free to determine the scope.[204] Religious, political and social ideologies that exist within a contracting state will affect the national courts attitude when considering whether enforcement of a foreign arbitral award should be granted.[205] Where refusal to enforce a foreign arbitral award may easily be justified, no effective remedy is

[198] Yunus Emre 'A refusal reason of recognition and enforcement of foreign arbitral awards: Public policy' (2019) 56 *Zbornik radova Pravnog fakulteta u Spltu* 503.
[199] Ibid. See also Orawiec op cit note 160 at 56.
[200] Ibid. See also Martinez op cit note 161 at 516.
[201] Ibid. See also Moses op cit note 16 at 243.
[202] Silberman op cit note 132 at 26.
[203] Wakim op cit note 115 at 50.
[204] Silberman op cit note 132 at 26.
[205] Wakim op cit note 115 at 50.

actually attained by the winning party as apart from the wasted time, costs and effort that was expended during the arbitration proceedings, the winning party is merely left with an award that serves no real purpose to them.[206]

(d) Implications on South Africa

Refusal on behalf of the national courts of a particular territory, to recognise or enforce an international arbitral agreement or award may have profound implications on South African international contracting parties. Section 34 of the Constitution of the Republic of South Africa, 1996 (the Constitution) provides that "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".[207] The purpose of section 34 of the Constitution is to "…guarantee the protection of the judicial process to persons who have disputes that can be resolved by law".[208] Furthermore, Section 1 (c) of the Constitution embodies values that are foundational to our constitutional order, and among these include the rule of law.[209] In *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* the Constitutional Court held that:

> "The first aspect that flows from the rule of law is the obligation of the state to provide the necessary mechanisms for citizens to resolve disputes that arise between them. This obligation has its corollary in the right or entitlement of every person to have access to courts or other independent forums provided by the state for the settlement of such disputes".[210]

In *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another,* the Constitutional Court held that section 34 of the Constitution applies indirectly to private arbitrations and emphasized the important role that national courts have in giving effect to international arbitration agreements.[211] The indirect application of the Bill of Rights necessitates that courts, when interpreting statutes or developing the common law or customary law, should promote the "spirit purport and object" of the Constitution.[212] As mentioned in the aforesaid, the rule of law is one of the foundational principles of the Constitution. Furthermore, in *Fose v Minister of Safety and Security* the Constitutional Court held that "…an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying, and the

[206] Nia op cit note 1 at xii.
[207] Constitution of the Republic of South Africa, 1996 (The Constitution): section 34.
[208] *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) para 13.
[209] The Constitution supra note 207 at section 1 (c).
[210] 2005 (5) SA 3 (CC) para 38.
[211] 2009 (4) SA 529 (CC) para 215.
[212] The Constitution supra note 207 at section 39 (2).

rights entrenched in the Constitution cannot properly be upheld or enhanced".[213] The Constitutional Court in *Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another* reaffirmed the contentions put forth in the *Fose* case and added that where compliance with a court order cannot be enforced the result would be that the "…ordinary citizen has no effective remedy available…".[214]

Therefore, where enforcement or recognition of international arbitral award or agreement is denied, such endeavour will have the effect of implicating the Constitution as it fails to promote the underlying values of the Constitution which includes the rule of law and access to courts to attain the settlement of a dispute. Additionally, apart from limiting one's right to access a court as well as implicating the rule of law, refusal to recognise or enforce an arbitral award also has the effect of leaving the affected party with no remedy.[215] This is antithetical to the purpose of the Constitution and its underlying values which necessitates that constitutional violations be vindicated in instances where Constitutional rights have been infringed.

(e) Solutions to address the inconsistencies present in the New York Convention

The New York convention is in need of reform.[216] Authors suggest that the New York convention, along with future international instruments should provide a uniform system of international procedural rules pertaining to the enforcement of international arbitral awards that are independent from national court systems to provide more certainty to international contracting parties.[217] It has been suggested that international treaties and conventions should set out and prescribe the scope of terms that may be ambiguous, such as public policy, to avoid the interpretation of such terms being extensively hauled out by national courts of contracting states.[218] Limiting the influence that national courts may have in the interpretation of grounds that may be raised to refuse recognition or enforcement of an arbitral award or agreement, is essential for attaining a successful international enforcement mechanism for international arbitral awards that is devoid of uncertainty.[219]

[213] 1997 (3) SA 786 (CC) para 69.
[214] 2008 (5) SA 94 (CC) para 79.
[215] *Fose* supra note 213 at footnote 187.
[216] Martinez op cit note 161 at 516.
[217] Ibid.
[218] Ibid.
[219] Ibid. See also Ti Seng Wei op cit note 172 at 616.

VI. CONCLUSION

International commercial arbitration is apt for resolving disputes that arise on a transnational level. The efficacy of the arbitral award that is handed down after the dispute has been settled by the arbitrator is of main concern. For an arbitral award to be considered as providing an effective remedy, such award must be capable of being enforced in the territory where the losing party has enough assets that can be realised to satisfy the loss suffered by the winning party. Enforcing an arbitral award in foreign states proves to be contentious. However, with the assistance of international treaties and conventions, the hurdles associated with enforcing an international arbitral award are ameliorated to quite a considerable extent. Nevertheless, the New York convention does contain certain inadequacies that have the potential to affect the effectiveness of international arbitral awards as well as international commercial arbitration on the whole. It enables national courts of contracting states to refuse recognition and enforcement of an arbitral award where it would contravene public policy or where the matter is non-arbitrable. National courts may cast the net too wide in their interpretation of concepts such as public policy. Ultimately resulting in the national courts of contracting states being justified in their action of refusing to enforce a foreign arbitral award on meagre grounds. It has been argued that the New York convention needs amendments to limit the influence that national courts have on international commercial arbitration.

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