THE TROUBLE-SHOOTING ROLE OF INTERNATIONAL CONVENTIONS, TREATIES, AND THE MODEL LAW IN THE REGULATION OF INTERNATIONAL BUSINESS, TRADE & INVESTMENT DISPUTES*[1]

Abstract

This paper seeks to provide an overview of contemporary legal framework for international commercial arbitration. Specifically, this paper summarizes the legal framework for the recognition and enforcement of international commercial arbitration awards across the globe, which demonstrates that most countries in the world acknowledge commercial parties' autonomy concerning dispute resolution and generally lends support to arbitration as a vital dispute resolution mechanism. One of the main themes of this paper is to consider the key objectives of contemporary international commercial arbitration. Second, this paper examines the contemporary international legal framework for international commercial arbitration, which are essentially international arbitration treaties, institutional arbitration rule and the Model Law, among others.

This paper argues that these international conventions have by far been one of the main reasons why most international business communities have preferred to use international commercial arbitration to settle cross-border disputes, because these international conventions are pro-active, progressive and by their nature, they take into consideration present day commercial realities. A good example is the New York Convention and the UNCITRAL Model Law, which have been adopted across the globe.

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1.0. Introduction

The establishment of international conventions and treaties has always been the most effective method of creating a 'unified' and harmonized system of law regulating international commercial arbitration. As Roberto Unger[2]- a leading jurisprudent once observed: "law is the glue that holds the society together." Likewise in private international law, with particular reference to

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[2]See Unger, Roberto Mangaabeira; Passion, AR Essay on Personality. New York: Free Press 1984. Roberto Unger was a Harvard Law Professor; belongs to a movement in legal theory and a network of leftist legal scholars that emerged in the1970s in the United States.

international commercial arbitration, international investment arbitration, and international maritime arbitration; the same legal axiom can be utilized to the effect that international conventions are the glue that hold the resolution of international business and investment disputes together. International conventions on international commercial arbitration thus, regulate conflict and dispute resolution emanating from international trade, business transactions and investments. In view of this, international conventions have helped to link national systems of law into a network of laws that, while they may differ in their wording, have as their common objective the international enforcement of arbitration agreements and of arbitral awards.[3] International, multilateral, and bilateral treaties form the major sources of international law. In addition to transnational treaties, international commercial arbitration is governed by several sources of law, including: (1) the national law governing the parties' capacity to enter into the arbitration agreement; (2) the law governing the arbitration agreement itself; (3) the law controlling the arbitral proceedings, such as the rules of a permanent arbitral institution like the International Arbitration Forum or an ad hoc arbitral body established by the parties; and (4) the law governing the substantive issues in the dispute.[4]

The first attempt to have a convention, which has an international outlook, was the signing of the Montevideo Convention.[5] This was established in 1889 and provided for the recognition and enforcement of arbitration agreements between certain Latin American states.[6] Thus, the Montevideo Convention can lay claim to being the first 'international' convention, in modern times. However, an argument can also be made that refutes this assertion. Indeed, the argument can be canvassed that the Montevideo Convention was not an international convention in the real legal sense of that phrasal usage, because it is a regional convention, whose application was only limited to certain South American countries.[7]

Historically, many international organizations have attempted to ensure the enforceability of arbitral awards through multilateral treaties, beginning with the Geneva Protocol of 1923[8] and followed by the Geneva Convention of 1927[9], both treaties collectively known as the Geneva Treaties.[10] Again, this further reinforces and lends credence to the fact that, not the Montevideo

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[3]Nigel Blackbay, Constantine Partasides, et al. (6th ed. 2015) at §1.206.

[4]Ranee K.L. Panjabi, Economic Globalization: The Challenge for Arbitrators, 28 VAND. J. TRANSNAT'L 173, 179 (1995).

[5]Treaty concerning the Union of South American States in respect of Procedural Law, signed at Montevideo on 11 January 1889. The Treaty is published, in an English translation, in United Nations, Register of Texts of Conventions and Other Instruments Concerning International Trade Law, Vol. II (UN, 1973), p.5. See Nigel Blackbay, Constantine Partasides, et al., supra note 32, footnote 215.

[6]Montevideo Convention, Arts 5-7; see Nigel Blackbay, Constantine Partasides, et al., supra note 3, at §1.207.

[7]The Convention was signed in Montevideo in Uruguay and the signatory countries were Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, and Uruguay.

[8]Protocol on Arbitration Clauses, Sept. 24, 1923, 27 L.N.T.S. 157 [hereinafter Geneva Protocol].

[9]Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 301 [hereinafter Geneva Convention].

[10]Volz, Jane L. and Haydock, Roger S. (1996) "Foreign Arbitral Awards: Enforcing The Award Against The Recalcitrant Loser," William Mitchell Law Review. Vol 21: Iss 3, Article 22. Available at: https://open.mitchellhamline.edu/wmlr/vol21/iss3/22, last accessed August 29, 2022.

Convention, but rather, the 1923 Geneva Protocol, whose idea was conceived and, which was drawn up on the initiative of the ICC (the International Chamber of Commerce) and with the sponsorship of the League of Nations, was the first modern international convention.

International treaties dealing with arbitration sometimes took the form of bilateral treaties, although the significance of such agreements was limited.[11] Beyond this, in the same connection, multilateral treaties have also aimed at promoting and enhancing international commercial arbitration by being pro-arbitration agreements and pro-arbitration awards friendly. These were the objects of the 1923 Geneva Protocol and the 1927 Geneva Convention, (which are both collectively referred to as the Geneva Treaties).

For purposes of this chapter, the following are the international conventions on international commercial arbitration that will be discussed and analyzed: The Geneva Protocol of 1923, The Geneva Convention of 1927, The New York Convention of 1958, Inter-American Convention on International Commercial Arbitration of 1975, The North American Free Trade Agreement and the U.S.-Mexico –Canada Agreement, The UNCITRAL Arbitration Rules of 1976, UNCITRAL Model Law of 1985, Riyadh Convention of 1983. In addition, these conventions' strengths, weaknesses, and innovations will also be examined.

1.1. The Geneva Protocol of 1923

Both the 1923 Geneva Protocol on Arbitration Clauses (Geneva Protocol)[12] and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards (Geneva Convention)[13] (collectively known as the Geneva Treaties) marked the beginnings of an attempt to unify and liberalize international commercial arbitration.[14] The idea and need for a truly international convention to unify and liberalize international commercial arbitration was conceived and inspired by the International Chamber of Commerce in France. Hence, these treaties remain the first genuinely international treaties on international commercial arbitration.

As discussed above, the Geneva Protocol of 1923 holds the record and has the honor of being the first modern and truly *international* convention on international commercial arbitration. Historically, in 1923, the League of Nations,[15] forerunner of the United Nations, established the Geneva Protocol with a view to making arbitration agreements and clauses, embedded in international contracts enforceable internationally. The drafters of the Geneva Protocol set out to make the protocol achieve two principal objectives, which are: first, to ensure that *arbitration clauses* were enforceable internationally, so that parties to an arbitration agreement would be

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[11]Bilateral treaties on international commercial arbitration are extant today. Many business nations today, have at one point in time or the other entered into a number of pacts, agreements, understanding, friendships and trade treaties that contain arbitral provisions relating specifically to the mutual recognition, enforcement, and execution of not just arbitration agreements, but also, principally, arbitration awards.

[12]Geneva Protocol, supra note 8.

[13]Geneva Convention, supra note 9.

[14]See Volz and Haydock, supra note 10.

[15]The League of Nations was founded on January 10, 1920 by the then President of the United States, to foster peace and prevent the repetition of another World War; the idea of an intergovernmental organisation whose principal mission was to foster global peace was conceived by President Wilson after the end of the First World War in 1919.

obliged to resolve their dispute by arbitration rather than through the courts.[16] This was done, in effect, by requiring national courts to refuse to entertain legal proceedings brought in breach of an agreement to arbitrate.[17] The second purpose of the 1923 Geneva protocol was to guarantee the enforcement of arbitration awards made pursuant to such arbitration agreements in the seat of arbitration.

Article I of the protocol required Contracting States to recognize

> the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.[18]

Indeed, the Geneva Protocol, which is part of the Geneva Treaties (the other one being the Geneva Convention of 1927) established basic requirements that Contracting States recognize and enforce international arbitration agreements and awards (subject to a number of important limitations), marking the beginning of contemporary international efforts comprehensively to facilitate and support the international commercial arbitration process.[19] The Geneva Protocol, together with its successor (the Geneva Convention) did not merely make international arbitration agreements and awards *as* enforceable as their domestic counterparts. Rather, these instruments made international arbitration agreements and awards *more* enforceable than domestic ones, establishing pro-arbitration standards that did not then exist in many domestic legal systems, for the specific purpose of promoting international trade and investment.[20]

Significant trading nations, including Brazil, Czechoslovakia, Denmark, Finland, France, Germany, Greece, India, Ireland, Japan, New Zealand, Norway, Poland, Portugal, Spain, Thailand, and the United Kingdom, became signatories to the Geneva Protocol.[21] The United States, however, failed to adopt the Geneva Protocol.[22]

In spite of the few achievements recorded during its existence, the Geneva Protocol did not exist without its defects. As a matter of fact, it left so much to long for. In addition to clauses that permitted individual national policies to govern the arbitration process, drafting defects hindered the enforcement process.[23] For example, nations could have varying interpretation on what was a

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[16]Nigel Blackbay, Constantine Partasides, et al., supra note 3, at §1.208.
[17]*Id.*
[18]See Geneva Protocol, Art. 1.
[19]Gary Born, International Commercial Arbitration (3rd ed.) Volume I: International Arbitral Awards at §1.04[A].
[20]*Id.*
[21]See ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 454-69 (2d ed. 1991).
[22]See John R. Allison, Arbitration of Private Antitrust Claims in International Trade: A Study in the Subordination of National Interests to the Demands of a World Market, 18 N.Y.U.J. INT'L. & POL. 361, 381 (1986).
[23]D. Alan Redfern, Remarks made during panel discussion on International Commercial Arbitration and International Public Policy (Apr. 10, 1987), in 81 AM. SOC'Y INT'L L. PROC. 372, 374 (1987).

"commercial matter."[24] Nations also could vary their interpretation of "existing and future differences."[25] Further, nations could disagree on which disputes were capable of settlement by arbitration.[26]

Another shortcoming of the Geneva Protocol was that its application was only limited to instances of arbitration made between parties who were subject to jurisdictions that had ratified the treaty.[27] Courts had difficulty in determining what constituted jurisdiction.[28] As a result, national courts were divided on the factors to consider in determining what constituted jurisdiction. Thus, in complying with the jurisdiction component, some courts held it to be a nationality requirement, while others held it to be "a requirement of residence, domicile or usual place of business."[29]

The major shortcoming of the Geneva Protocol was that there was no enforcement guarantees measures in place in the event that an award was rendered. Put in a better perspective, the Geneva Protocol lacked any international enforcement requirement.[30] The implication of this is that ratifying countries had the obligation only to enforce awards rendered in their own jurisdiction without more. Consequently, even if both disputing parties were determined to be in a jurisdiction that adhered to the Geneva Protocol, if the nation in which the award was made was not the nation in which the award was to be enforced, the successful party lacked power to enforce the award.[31] Clearly, this negated the main philosophy behind the establishment of the Geneva Protocol of 1923, which was the enforcement of arbitral awards internationally.

It must be noted, however, despite its few shortcomings, the Geneva Protocol, whose fundamental goals are the enforcement of both arbitration agreements and arbitral awards- these same goals are 'mimicked' and reflected in subsequent international instruments, such as the New York Convention and the UNCITRAL Model Law. For example, in the former instrument, Article II provides for the recognition and enforcement of arbitration agreements.[32] Likewise Article III, which embodies the pro-enforcement bias of the New York Convention and requires "each Contracting State to recognize arbitral awards as binding and enforce them."[33] Ditto to the Model Law.[34] To that end, the influence of the first Geneva Convention can be seen throughout history, even though the Geneva Protocol is now a spent force.[35]

1.2. **The Geneva Convention of 1927**

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[24]I*d.*
[25]*Id.*
[26]*Id.*
[27]W. Laurence Craig, Some Trends and Developments in the Laws and Practice of International Commercial Arbitration, 30 TEX. INT'L L.J. 1, 9 (1995).
[28]REDFERN & HUNTER ON INTERNATIONAL ARBITRATION, (6th ed. 2015) at 43.
[29]*Id.*
[30]Ranee K.L. Panjabi, Economic Globalization: The Challenge for Arbitrators, 28 VAND. J. TRANSNAT'L 175 (1995).
[31]REDFERN & HUNTER, supra note 28, at 61-62.
[32]See the New York Convention, Art. II(1).
[33]See the New York Convention, Art. III.
[34]See generally the Model Law, Arts. 7 & 35.
[35]Nigel Blackbay, Constantine Partasides, et al., supra note 3, at §1.208.

The 1927 Geneva Convention[36] was established to improve on the legal framework of the 1923 Geneva Protocol by providing for the recognition and enforcement of arbitral awards made within the territory of *any* of the contracting states (and not merely within the territory of the state in which the award was made). Simply put, the purport of the Convention is the enforcement of arbitral awards rendered outside the jurisdiction in which the award was made, on the condition that the enforcing jurisdiction was a party to the Convention.

As mentioned above, the Geneva Convention attempted to ameliorate the inadequacies of the Geneva Protocol while promoting international commercial arbitration.[37] However, the absence of substantive enforcement provisions and mechanism in the treaty made it lack the actual power it needed to achieve its principal objectives, which are the recognition and enforcement of both arbitration agreements and awards.

The general rule under the 1927 Geneva Convention was that a party seeking enforcement of an award under the convention had the onus of proving the condition precedent to enforcement. This was given statutory support under Article 4(2) of the Geneva Convention of 1927[38], which provides in pertinent part:

> The party relying upon an award or claiming its enforcement must supply, in particular:
> (2) Documentary or other evidence to prove that the award has become final, in the sense defined in Article 1(d), in the country in which it was made.
>
> For purposes of clarity, the Article 1 sub-paragraph (d) alluded to above provides thus:
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> "That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, appeal or pourvoi en cassation (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending."[39]

This led to what became known as the problem of '*double exequatur'*. This concept describes the process where the award becomes final in its country of origin. This process requires the successful party to seek a declaration (an exequatur) in the courts of the country where the seat of arbitration is located to the effect that the award was enforceable in the country before it could proceed. This allows the moving party to enforce the award (a second exequatur) in the courts of the place of enforcement. This meant that the finality status of the award was left to the discretion of the court of the territory where the arbitration took place. Of course, the drawback to this was conflicting decisions on the part of the rendering nation.

Laudably, although the Geneva Convention was an amelioration of the Geneva Protocol, its limitation was most felt in the area of foreign awards enforcement. For example, Article 1(e) of the Geneva Convention[40] states that recognition or enforcement of arbitral award must not be contrary to the public policy or to the principles of the law of the enforcing jurisdiction. It is submitted that, in practice, this provision subjected arbitral awards to numerous attacks on technical grounds. To that end, the second Geneva Convention provided some progress regarding

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[36]Convention on the Execution of Foreign Arbitral Awards, signed at Geneva on 26 September, 1927.
[37]Panjabi, supra note 30, at 175.
[38]See Geneva Convention, Art. 4(2).
[39]See Geneva Convention, Art. 1(d).
[40]See Geneva Convention, Art. 1(e).

arbitration recognition; however, it also opened the door to future problems that will be seen in the discussion of future conventions on the recognition and enforcement of arbitration awards.

1.3. **The New York Convention of 1958**

At the completion of the Geneva Conventions, it was clear to international authorities that future regulations were necessary to amend issues that had developed from the implementation of those previous Conventions. One example was the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)[41] replaced the Geneva Treaties. Additionally, to cure the defects inherent in the Geneva Protocol of 1923 and the Geneva Convention of 1927, the United Nations Economic and Social Council in 1956 drafted a multilateral convention to provide for a more "pro-enforcement" arbitral process that would further protect the integrity of international arbitration awards.[42] To that end, the New York Convention of 1958 effected positive change which built on the foundation established by the Geneva Conventions discussed earlier in this chapter.

The New York Convention of 1958 was the aftermath of a big conference that was convoked in 1958 in Washington- the headquarters of the United Nations. The conference, after much deliberation by scholars, academics, the international business and arbitration community, culminated in the adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Generally referred to as the 'New York Convention", the treaty is by far the most significant contemporary legislative instrument relating to international commercial arbitration[43].

A leading commentator on the New York Convention- Albert J. Van Den Berg has hailed the convention as the "cornerstone of current international commercial arbitration."[44] Another scholar on international arbitration had this to say about the Convention: "...the single most important pillar on which the edifice of international arbitration rests."[45] It has gained phenomenal acceptance by the international community.[46] Currently, the New York Convention has 167 Contracting States which are signatories to it, including Latin American states, such as Argentina, Colombia, Mexico, and Venezuela.[47] In the Arab world, members include Saudi Arabia, Egypt, Kuwait, and Dubai.[48] On February 13, 2020, Ethiopia became the thirty-third country in Africa to ratify the 1958 New York Convention.[49]

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[41]The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (effective in the U.S. Dec. 29, 1970).
[42]Elise P. Wheeless, Article V(1)(b) of the New York Convention, 7 EMORY INT'L L. REV. 805, 806 (1993).
[43]Born, supra note 19, at §1.04 [A][1].
[44]A. van den Berg, The New York Arbitration Convention of 1958 1 (1981).
[45]J. Gillis Wetter, The Present Status of the International Court of Arbitration of the ICC: An Appraisal, 1 AMER. REV. OF INT'L ARB. 91 (1990).
[46]Kristin T. Roy, The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards? 18 FORDHAM INT'L L.J. 920, 920 (1995).
[47]Available at https://hsfnotes.com, last accessed August 31, 2022.
[48]*Id.*
[49]See Duffy & Fouchard, Ethiopia Ratifies the New York Convention (2020), available at https://www.reedsmith.com, last accessed August 31, 2022.

The New York Convention represents the culmination of efforts by many international organizations to secure a multilateral treaty providing businesspersons with a unified, efficient, and trustworthy method of insuring that the manner they have chosen to resolve their transnational disputes will be effective.[50] As the United States Supreme Court stated in Scherk v. Alberto-Culver Co.[51] -a case involving the enforcement of an international arbitration agreement:

> The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was 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.[52]

The underlying purpose of the New York Convention is to eradicate the limitations which inhibited the growth of the Geneva Treaties- thus, making provisions for more effective method of obtaining recognition and enforcement of foreign arbitral awards. For example, the Geneva Treaties apply only to commercial claims, but the New York Convention can apply to both commercial and non-commercial matters.[53] However, parties to the New York Convention can opt for the "commercial reservation," allowing application to only commercial claims.[54]

More significantly, quite unlike the position under the Geneva Treaties, the New York Convention was innovative enough to permit the enforcement of an award in a non-contracting territory.[55] To buttress this, under the Reciprocity reservation, some countries may choose not to limit the Convention to only awards from other contracting states, but may however limit application to awards from non-contracting state such that they will only apply it to the extent to which such a non-contracting state grants reciprocal treatment.[56] As a result, the New York Convention "confers legitimacy upon awards granted in any state, whether or not a contracting state, and whether or not the parties are subject to the jurisdiction of different contracting states.[57] It is noteworthy that the title of the Convention, which reads thus: 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards' is rather misleading. The title makes it look as though the Convention deals only with recognition and enforcement of foreign arbitral awards. On the contrary, a community reading of Articles II, IV(1)(b) as well as V(1)(a) makes it convincingly clear the Convention also deals with enforcement of arbitration agreements.

In order to enforce arbitration agreements, the New York Convention embraces a provision found in the 1923 Geneva Protocol: to prevent the ship of international arbitration from 'running aground,' the national courts of contracting states are required to prohibit a dispute, which is a subject-matter of an arbitration agreement to be brought before them, if any party to the said

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[50]Ramona Martinez, Recognition and Enforcement of International Arbitral Awards Under The United Nations Convention of 1958: The "Refusal"' Provisions 24 Int'l. 487 (1990).
[51]See Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 (1974)
[52]*Id.*
[53]See Volz and Haydock, supra note 10.
[54]*Id*.
[55] See New York Convention, Art. 1(1).
[56]See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, available at https://en.m.wikipedia.org, last accessed August 31, 2022.
[57]Cindy Silverstein, Iran Aircraft Industries v. Avco Corporation: Was a Violation of Due Process Due?, 20 BROOK. J. INT'L L. 443, 454 (1994).

arbitration agreement raises an objection to such litigation.[58] The court is therefore required to refer them to arbitration.[59] This principle of law is also given statutory codification in 9 U.S.C. §3, which provides that:

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration".[60]

Equally, Nigeria's equivalent version of this provision of court referral of parties to arbitration is provided for in Section 4(1) of the Arbitration and Conciliation Act of Nigeria, which provides that:

> "A court before which an action which is the subject of an arbitration agreement is brought shall, if any party so request not later than when submitting his first statement on the substance of the dispute, order or stay of proceedings and refer the parties to arbitration."[61]

However, in Prima Paint Corp. v. Flood & Conklin Mfg. Co.,[62] the court laid down some conditions that must be in existence before it can make an order compelling arbitration. It stated that arbitration may be compelled when: (1) there is a valid written agreement to arbitrate; (2) the issue is arbitrable under the agreement; and (3) the party asserting the claims has failed or refused to arbitrate the claims.[63] To that end, the New York Convention adopted provisions that strengthened arbitration clauses in contracts and gave significance to the process of arbitration in general. This is a prime example of how the New York Convention took key elements of the previous Conventions, but also helped move the process of international commercial arbitration in general.

1.4. European Convention on International Commercial Arbitration

The first regional treaty on international commercial arbitration is the European Convention on International Commercial Arbitration. While the New York Convention serves as a benchmark for how international commercial arbitration is conducted, it is important to note that other regional Conventions have helped shaped how different countries regulate their own arbitration process. The European Convention on International Commercial Arbitration[64], also known as the 1961 Geneva Convention is one of the leading regional commercial arbitration treaties. The work, which culminated in the signing of the treaty, began in 1954. The drafting of

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[58]New York Convention, Art. II(3).
[59]*Id.*
[60]See 9 U.S.C. §3.
[61]See Arbitration and Conciliation Act Chapter 18 Laws of the Federation of Nigeria 2004, Section 4.
[62]Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 400, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). See also Goldberg v. Donaldson, Lufkin & Jenrette Sec. Corp., 650 F.Supp. 222, 225 (N.D.Ga.1986).
[63]*Id.*
[64]European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 349, 363-64.

the European Convention aimed at producing a treaty that would improve upon the then existing legal framework for international arbitration involving parties from European states.[65] The drafting process took longer than expected (and delayed by the intervening New York Convention), but ultimately concluded with signing of the Convention in Geneva on 21 April 1961, three years after the New York Convention was opened for signature.[66]

The European Convention has a more restrictive application, because it applies exclusively to nations in Western and Eastern Europe.[67] The Convention entered into force in 1964, and currently, there are 31 countries who are parties to it.[68] Most European nations are party to the 1961 Geneva Convention. However, it is surprising that popular European countries, such as the United Kingdom, the Netherlands and Finland, are not party to the Convention. It is instructive to also note that some ten non-European nations, including an African country, are party (Cuba and Burkina Faso) to the Convention. The Convention comprises ten articles and a well detailed annex (which addresses certain procedural matters).

The 1961 European Convention was drafted specifically to address problems encountered between Eastern and Western European countries.[69] While most of the ratifying nations to this Convention are also signatories to the New York Convention, the 1961 Geneva Convention was adapted for difficulties that may occur between communist-controlled countries of the Eastern bloc and non-communist European countries.[70] Parties to the 1961 European Convention are subject to specific procedural rules that remove the "role of national law in determining the grounds for setting aside an award."[71]

It is important to note that the 1961 European Convention does not directly affect U.S. businesses because the United States is not a party. However, the Convention remains important to any private party engaging in business in Europe because it sets forth the procedural framework for the commonplace business interactions between European countries and thus can tangentially affect U.S businesses.[72] Accordingly, it is advisable to consult with local attorneys in Europe and become acquainted with the 1961 European Convention before parties enter into business transactions in Europe that have arbitration clauses in them.

1.5. **ICSID Convention**

The Convention on the settlement of Investment Disputes Between States and Nationals of Other States[73] is also known as the ICSID or the Washington Convention. The ICSID Convention

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[65]Glossner, The Institutional Appointment of Arbitrators, 12 Arb. Int'l 95 (1996).
[66]See Hascher, European Convention on International Commercial Arbitration: A Commentary (2018).
[67]European Convention, Art. X(1).
[68]See European Convention, 484 U.N.T.S. 349 (1961).
[69]John R. Allison, Arbitration of Private Antitrust Claims in International Trade: A Study in the Subordination of National Interests to the Demands of a World Market, 18 N.Y.U. J. INT'L. & POL. 382 (1986).
[70]*Id.*
[71]*Id.*
[72]Volz and Haydock, supra note 10.
[73]The formal name for the ICSID Convention or the Washington Convention is the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. It is available at www.worldbank.org/icsid., last accessed Sept. 1, 2022.

is a multilateral treaty formulated by the Executive Directors of the International Bank for Reconstruction and Development (the World Bank).[74] The ICSID Convention is a foundation on which the edifice of international investment is built.[75]

On March 18, 1965, the Executive Directors of the International Bank for Reconstruction and Development (IBRD) submitted the Convention, with an accompanying Report, to member governments of the World Bank for their consideration of the Convention with a view to its signature and ratification.[76] The Convention entered into force on October 14, 1966, when it had been ratified by 20 countries. As of April 10, 2006, 143 countries have ratified the Convention to become Contracting States.[77] Currently, there are 154 Contracting States to the Convention.[78] This includes states from all geographic regions of the world.

The Convention prescribes ICSID's mandate, organization and core functions. The primary purpose of ICSID is to provide facilities for conciliation and arbitration of international investment disputes.[79] The Convention sought to remove major impediments to the free international flows of private investment posed by non-commercial risks and the absence of specialized international methods for investment dispute settlement.[80].

The Convention, in performing one of its cardinal objects, which is the promotion of foreign investments, established the International Centre for Settlement of Investment Disputes ("ICSID")- a neutral and specialized arbitral forum/institution, whose principal jurisdiction is to administer international investment arbitrations and conciliations, in accordance with the establishing Convention[81] and, in a limited situations, otherwise.[82] The resort to ICSID to resolve

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[74]See Jay E. Grenig, International Arbitral Conventions and Treaties, INTLCOMARB § 3:16 (2001).
[75]ICSID is headquartered in Washington, D.C. - where the headquarters of the World Bank is located. The World Bank is comprised of two international development institutions: the International Bank for Reconstruction and Development ("IBRD") and the International Development Association ("IDA") (both collectively "World Bank"). See www.worldbank.org., last accessed Sept.1, 2022. The work of these two institutions is aided by that of the International Finance Corporation ("IFC"), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for the Settlement of Investment Disputes ("ICSID").
[76]See ICSID Convention, Regulations and Rules, available at www.icsid.worldbank.org., last accessed Sept. 1, 2022.
[77]*Id.*
[78]See ICSID, List of Contracting States and Other Signatories of the Convention, available at www.icsid.worldbank.org., last accessed Sept. 1, 2022. Other states that ratified the ICSID Convention include: Iraq, San Marino, Nauru, Mexico, etc. On the contrary, in recent years, a few states have also denounced their accession to the ICSID Convention (Bolivia, Ecuador and Venezuela). See Born, supra note 155, at §1.04 [A][4] (footnote 888).
[79]See Jay E. Grenig, International Arbitral Conventions and Treaties, INTLCOMARB § 3:16 (2001).
[80]*Id.*
[81]See ICSID Convention, Art. 1.
[82]The ICSID Additional Facility (created in 1978) offers arbitration and conciliation of investment disputes between a State and a foreign national, one of which is not an ICSID Contracting State or a national of an ICSID Contracting State; arbitration and conciliation of disputes that do not arise directly out of an investment between a State and a Foreign national, at least one of which is an ICSID Contracting State or a national of an ICSID Contracting State; and fact-finding proceedings

investment disputes between states and investors is achieved by means of the insertion of arbitration clauses in state contracts. Nevertheless, the *travaux preparatories* of the Convention also made clear that the consent of the state to arbitration could be established through the provisions of an investment law.[83]

The ICSID Convention expressly sets forth the jurisdiction of the ICSID and states that the Convention does not apply to disputes not involving a Contracting State and an investor from another Contracting State or to disputes between private parties.[84] It also does not apply to purely commercial disputes that do not involve an investment.[85] As mentioned earlier, the Convention was conceived to facilitate the resolution of "investment disputes" (i.e., "legal dispute[s] arising directly out of an investment"[86]) that the parties have agreed to submit to ICSID.[87] Investment disputes are defined as controversies that arise out of an "investment" and are between a Contracting State (or "host State") or a designated state-related entity from that state and a national of another Contracting State (or "investor").[88]

ICSID has two principal organs, which are: the Administrative Council and the Secretariat.[89] Its main office is located in Washington. At the same time, it maintains a panel of Conciliators and a panel of Arbitrators with unquestionable characters and expertise in the areas of law, commerce, finance or industry.[90] The panel members have security of office and they are allowed renewable periods of six years to serve the Centre.[91]

1.6. **Inter-American Convention on International Commercial Arbitration**

Another regional treaty on international commercial arbitration is the Inter-American Convention on International Commercial Arbitration. This Convention is the replica of the New York Convention in Latin American countries. After the pioneering Montevideo Convention in 1889, and the Bustamante Code in 1920, much of South America effectively turned its back on

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instituted by any State or a national of any State. See Born, supra note 102, at §1.04 [A][4] (footnote 887).

[83]See ICSID, 'Report of the Executive Directors of the International Bank for Reconstruction and Development on the [ICSID Convention]', in ICSID Convention, Regulations and Rules (ICSID, 2006), p. 43, para.24:

> ... Nor does the Convention require that the consent of both parties be expressed in a single instrument. Thus, a Host State might in its investment protection legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.

[84]Born, supra note 155, at §1.04 [A][4].

[85]*Id.*

[86]ICSID Convention, Art. 25(1).

[87]*Id.* See also Krishan, A Notion of ICSID Investment, in T. Weiler (ed.), Investment Treaty Arbitration: A Debate and Discussion 61-84 (2008).

[88]See Amerasinghe, Jurisdiction Ratione Peronae Under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 47 Brit. Y.B. Int'l L. 227 (1974-75).

[89]ICSID Connvention, Art. 3.

[90]*Id.*

[91]ICSID Convention, Art. 15.

international commercial arbitration.[92] Only Brazil ratified the Geneva Protocol, and even it did not adopt the Geneva Convention.[93] South American states were very reluctant to ratify the New York Convention. They only began to do in the 1980s.[94]

The historical background of what came to be known as the Panama Convention dates back to 1975. In 1975, the First specialized Conference on Private International Law in Panama completed the Inter-American Convention on International Commercial Arbitration,[95] commonly known as the Panama Convention. As mentioned earlier, in the past, Latin American countries were particularly reluctant to favor arbitration as their preferred means of resolving cross-border business disputes. This unwillingness was for the most part due to the influence of the Calvo Doctrine.

The Calvo Doctrine primarily resulted from "exploitation by large foreign-owned corporations of natural resources in the underdeveloped world during the late nineteenth and the early twentieth centuries."[96] As increasing numbers of foreign investors began to saturate the developing countries in Latin America, the foreigners encountered numerous problems with local governments.[97] Subsequently, the foreign investors began to demand protection from the local authorities.[98] In turn, the Latin American governments granted diplomatic protection by allowing foreigners to "appeal to their home state for protection of their personal and property rights."[99] This ultimately led to flagrant abuses, which, in response, resulted in the establishment of the Calvo Doctrine.[100] This doctrine eluded any diplomatic protections under any circumstances and provides:[101]

> "First, that sovereign States, being free and independent, enjoy the right, on the basis of equality, to freedom from "interference of any sort"... by other states, whether it be by force or diplomacy, and second, that aliens are not entitled to rights and privileges not accorded nationals, and that therefore may seek redress for grievances only before the local authorities."[102]

It is essential to understand the history behind the establishment of the Calvo Doctrine. This is necessary, because it helps to fully grasp the perception and attitude of Latin American countries to international arbitration. "The United States and Europe regard the use of the Calvo Clause as an attempt at 'non-responsibility,' by which the host governments seek to immunize

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[92]Born, supra note 19, at §1.04 [A][3].
[93]*Id.*
[94]*Id.*
[95]HOUSTON P. LOWRY, CRITICAL DOCUMENTS SOURCEBOOK ANNOTATED: INTERNATIONAL COMMERCIAL LAW AND ARBITRATION 251 (1991).
[96]Justine Daly, Has Mexico Crossed the Border on State Responsibility for Economic Injury to Aliens? Foreign Investment and the Calvo Clause in Mexico After the NAFTA, 25 ST. MARY'S L.J. 1147, 1162 (1994).
[97]*Id.*
[98]William W. Park, When the Borrower and the Banker Are at Odds: The Interaction of Judge and Arbitrator in Trans-border Finance, 65 TUL. L. REV. 1323, 1326 (1991).
[99]Justine Daly, Has Mexico Crossed the Border on State Responsibility for Economic Injury to Aliens? Foreign Investment and the Calvo Clause in Mexico After the NAFTA, 25 ST. MARY'S L.J. 1163 n. 79 (1994).
[100]*Id*. at 1163.
[101]*Id*. at 1164.
[102]See DONALD R. SHEA, THE CALVO CLAUSE 19 (1955).

themselves from any international claims."[103] Thus, the adoption of the Panama Convention demonstrates an affirmative stride toward breaking away from the Calvo Doctrine's protectionistic mentality.[104] Nonetheless, it is still common for Latin American countries, including Mexico, to adhere to the Doctrine.[105] In fact, Mexico still retains a Calvo Clause in its constitution.[106]. However, "Mexico, formerly the premier supporter of the Calvo Doctrine, has set aside that conviction to gain economically... even though the Mexican Constitution still contains a Calvo Clause."[107]

Signatory and ratifying countries to the Panama Convention include: Argentina, Chile, Columbia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay, Venezuela, and the United States.[108] Bolivia, Brazil, the Dominican Republic, and Nicaragua have signed but not ratified the treaty.[109] The United States is also a party to the Panama Convention, but ratified it in 1990.[110]

The Panama Convention is similar to the New York Convention in many respects: indeed, the Inter-American Convention's drafting history makes clear that it was intended to provide the same results as the New York Convention.[111] The Panama Convention, inter alia, provides for the presumptive enforceability of arbitration agreements[112] and arbitral awards,[113] subject to specified exceptions similar to those in the New York Convention.[114]

The Convention provides for the reciprocal enforcement of commercial arbitration awards in Contracting States. Article 4 provides that:

> "An arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judgment. Its execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts,

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[103] Daly, supra note 99, at 1164.
[104] Volz and Haydock, supra note 10.
[105] *Id.*
[106] Daly, supra note 99, at 1177-78.
[107] *Id.*
[108] Andre J. Brunel, A Proposal to Adopt UNCITRAL's Model Law on International Commercial Arbitration as Federal Law, 25 TEX. INT'L L.J. 43, 53 n. 78 (1990).
[109] *Id*. at 53 n. 78.
[110] See 9 U.S.C. § 301 (1994).
[111] H.R. Rep. No. 501, 101st Cong., 2d Sess. 4 (1990), reprinted in 1990 U.S.C.C.A.N. 675, 678 ("The New York Convention and the Inter-American Convention are intended to achieve the same results, and their key provisions adopt the same standards, phrased in the legal style appropriate for each organization. It is the Committee's expectation, in view of that fact and the parallel legislation under the Federal Arbitration Act that would be applied to the Conventions, that courts in the United States would achieve a general uniformity of results under the two Conventions."). See also Productos Mercantiles e Industriales, SA v. Faberge USA, 23 F.3d 41, 45 (2d Cir. 1994) ("the legislative history of the Inter-American Convention's implementing statute... clearly demonstrates that Congress intended the Inter-American Convention to reach the same results as those reached under the New York Convention").
[112] Panama Convention, Art. 1.
[113] Panama Convention, Arts. 4-5.
[114] Panama Convention, Art. 5.

in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties."[115]

Even though the Panama Convention mirrors the New York Convention in many respects, the former, nonetheless, has an innovation which makes it a step ahead of the latter. For example, the Panama Convention provides in Article III that in the absence of an express agreement between the parties as to the choice of institutional or arbitration rules, the rules of the "Inter-American Commercial Arbitration Commission" ("IACAC") shall govern the conduct of the arbitration.[116] On its own part, the Inter-American Commercial Arbitration Commission has also adopted arbitration rules alike with the UNCITRAL Rules.[117] Another innovation of the Panama Convention is that it allows for flexibility in the appointment of arbitrators and the parties have the freedom to appoint arbitrators of their choice regardless of nationality.[118]

However, the fact that the Panama Convention is innovative in some of its provisions does not mean that it does not have its drawback. The Panama Convention, unlike the New York Convention, is less pro-active, because it fails to make provisions dealing expressly with court proceedings brought in national courts in contravention of an arbitration agreement.[119] Again, enforcing an award in a Latin American country adhering to the Panama Convention can still result in procedural dilemmas.[120] "Despite legal provisions providing for the ... recognition of foreign awards, the procedural laws of many Latin-American countries frustrate the aim of international commercial arbitration..."[121] In any event, the Panama Convention demonstrates a positive step in commercial arbitration in Latin American countries, a well-needed shift away from the debilitating effects of the Calvo doctrine.[122]

1.7. The North American Free Trade Agreement and the U.S.-Mexico-Canada Agreement

There are quite a number of multilateral treaties that also play significant roles in the area of international investment law. These multilateral treaties establish legal framework that bear a closer resemblance with other investment treaties, such as the ICSID Convention. One of such multilateral treaties is the North American Free Trade Agreement,[123] which is commonly referred to as "NAFTA." The North American Free Trade Agreement is a multilateral treaty between Canada, Mexico and the United States which addresses a wide range of trade, investment and other

[115]Panama Convention, Art. 4.
[116]Panama Convention, Art. 3.
[117]See IACAC Rules, available at www.sice.oas.org., last accessed Sept.2, 2022.
[118]Panama Convention, Art. 2.
[119]This is in contradistinction with the provision of New York Convention, Art. II (3).
[120]Volz and Haydock, supra note 10.
[121]ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 469 (2d ed. 1991) (quoting Alejandro M. Garro, Enforcement of Arbitration Agreements and Jurisdiction of Arbitral Tribunals in Latin America, 1. J. INT'L ARB. 293, 298 (1984).
[122]Volz and Haydock, supra note 10.
[123]North American Free Trade Agreement, done Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289, 605.

issues.[124] The NAFTA was renegotiated in 2018 and 2019 and is expected to be terminated and replaced by the U.S.-Mexico-Canada Agreement in 2020.[125]

NAFTA expressly encourages the use of alternative dispute resolution techniques to settle disputes between private commercial parties.[126] Under NAFTA, Canada, Mexico, and the United States must have legal mechanisms in place to enforce arbitration awards.[127] In addition, a special trilateral committee under NAFTA will review and report on private dispute settlement issues.[128]

1.9. UNCITRAL Model Law

In 1985, the United Nations Commission on International Trade Law (hereinafter UNCITRAL) enacted the Model Law on International Commercial Arbitration. It is noteworthy that, unlike the other international arbitration conventions, such as the New York Convention, the European Convention on International Commercial Arbitration, the Panama Convention, etc., discussed above; the Model Law is not treaty countries ratify as a whole or not at all; not every country that implements the UNCITRAL Model Law adopts it in the same form- some countries modify it while some revise it to suit their jurisdiction. Nigeria is a good example of a country whose national arbitration law is modelled after that of the UNCITRAL Model law. Furthermore, it is limited to disputes relating to international contracts leaving each nation which adopts it still free to make provisions for purely domestic arbitration.[129]

It is necessary to have a background of the UNCITRAL Model Law in order to best appreciate its workings, innovations, and accomplishments. The UNCITRAL Model Law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985, at the close of the Commission's 18th annual session in Vienna.[130] The General Assembly, in its resolution 40/72 of 11 December 1985, recommended "that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedure and the specific needs of international commercial arbitration practice."[131]

The Model Law, specifically, was designed to meet concerns relating to the current state of national laws on arbitration.[132] The justification for the adoption of the Model Law was based on the need to harmonize and improve domestic laws on arbitration. In addition, there was

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[124]Born, supra note 19, at §1.04 [A][5].
[125]*Id.*
[126]Volz and Haydock, supra note 10.
[127]Carolita L. Oliveros, International Distribution Issues: An Overview of Relevant Laws, in PRODUCT DISTRIBUTION AND MARKETING, 553, 581 (ALI-ABA Course of Study, March 17, 1994), available in WESTLAW, C888 ALI-ABA 553.
[128]Dispute Resolution, NORTH AMERICAN FREE TRADE AGREEMENT, Aug. 1992, available in WESTLAW, NAFTA Database, 1992 WL 239310.
[129]Olakunle Orojo and Ayodele Ajomo, Law and Practice of Arbitration and Conciliation in Nigeria, p. 20 (1st ed.) (1999).
[130]See UNCITRAL Model Law on International Commercial Arbitration-Explanatory Documentation Prepared for Commonwealth Jurisdictions, at §1.01, available at https://uncitral.un.org, last accessed Sept.3, 2022.
[131]*Id*. at § 1.03.
[132]See SICE UNCITRAL Model Law on International Commercial Arbitration- Foreign Trade Information System, available at http://www.sice.oas.org., last accessed September 22, 20201.

concurrence of findings that domestic laws were inadequate and inappropriate for resolution of international arbitral cases. Quite in the same direction, UNCITRAL also felt that there existed disparities in domestic laws of most arbitration states.[133] Hence, the need for a Model Law on international commercial arbitration to remedy this.

It may be said that if the New York Convention put international arbitration on the world stage, it was the Model Law that made it a star, with appearances in state across the world.[134] The following are the Policy objectives adopted by the UNCITRAL in preparing the Model Law:

First, the liberalisation in international commercial arbitration by limiting the role of national courts by giving effect to the doctrine of "autonomy of the will", allowing the parties freedom to choose how their disputes should be determined;[135]

Secondly, the establishment of certain defined core mandatory provisions to ensure fairness and due process;[136]

Thirdly, the provisions of framework for the conduct of international commercial arbitration so that in the event of the parties being unable to agree on procedural matters, the arbitration would nevertheless be capable of being completed;[137]

Lastly, the establishment of other provisions to aid enforceability of award and clarify certain controversial issues.[138]

The Model Law, which came into force in 1985, has been overtaken by new and innovative dimensions to international arbitration. In light of the above, in 2000, UNCITRAL instituted a working group with the primary assignment of coming up with proposals for amendments to the Model Law. Consequently, in 2006, UNCITRAL adopted a limited number of amendments to the Model Law.[139] The principal revisions can be seen in two main parts: first, the definition and written form of an arbitration agreement;[140] and secondly, the provisions governing the power of an arbitral tribunal to order interim measures of relief.[141] With respect to the former, by virtue of Article 7(3) of the UNCITRAL Model Law, an arbitration agreement is said to be in writing if its content is reduced into any form- it does not matter if the arbitration agreement or underlying contract has been concluded orally, by conduct, or by other means.[142] Furthermore, the Model Law in its innovative provision, states in Article 7(4) that "the requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data messages" means information generated, sent, received or stored by electronic, magnetic, optical or similar means,

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[133]Supra note 437*,* at § 1.05.
[134]Nigel Blackbay, Constantine Partasides, et al., supra note 3, at §1.220.
[135]Orojo & Ajomo, supra note 129, at 19.
[136]*Id.*
[137]*Id.*
[138]*Id.*
[139]UNCITRAL Model Law, 2006 Revisions. See also Paulsson & Petrochilos, Report: Revision of the UNCITRAL Arbitration Rules (2006).
[140]UNCITRAL Model Law, 2006 Revisions, Art. 7.
[141]UNCITRAL Model Law, 2006 Revisions, Art. 17.
[142]UNCITRAL Model Law, 2006 Revisions, Art. 7(3).

including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy."[143]

A considerable number of countries have incorporated the 2006 revisions to the Model Law into their national arbitration laws. Examples of such countries include: Belgium, Slovenia, Ireland, Costa Rica, Peru, New Zealand, and Mauritius.

Pursuant to Article 5 of the Model Law, which provides that: "In matters governed by this Law, no court shall intervene except where so provided in this Law"[144] The simple meaning of this provision is that it shows the Model Law's attitude to judicial intervention in arbitral proceedings. In effect, the Model Law prohibits national courts from interfering generally with the choice of the parties to arbitrate and more particularly, with the arbitral proceedings. In practice, this is often achieved by the court staying judicial proceedings brought in breach of an arbitration agreement.

However, the same Model Law in Article 8(1) provides that:

> "A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."[145]

The above provision reiterates the foregoing position of the law regarding one of the very few instances when the courts may intervene in the arbitral process. Indeed, Article 8(1) of the Model Law sanctions judicial intervention in the arbitral proceedings with the sole aim of preserving the integrity of the arbitral process and boosting the confidence of parties in the institution of arbitration. The Model Law also states instances when the judex may lend judicial assistance to the arbitral process in prescribed respects, including provisional measures, constitution of a tribunal and evidence-taking. [146]

It is important to mention that it is theoretically possible for parties to "opt-out" of the coverage of the Model Law.[147] Although, this has never occurred in practice.[148] However, the case of ***Wagners Nouvelle Caledonie Sarl v. Vale Inco Caledonie***[149] is one of the few instances where this has occurred in practice. In that case, it was stated that "a reasonable person with the attributes of the parties would have been aware that the [UNCITRAL Rules] and the Model Law were capable of operating together. There existed a wealth of commentary and other materials... to that effect and the terms of the [UNCITRAL Rules] and the Model Law demonstrated that this was so."[150] Also, in Cargill Int'l SA v. Peabody Australia Mining Ltd,[151] the court had this to say:

> "agreement by parties to refer any disputes to international arbitration under a particular set of procedural rules (as opposed to an agreement that the *lex arbitri* should be other than

[143]UNCITRAL Model Law, 2006 Revisions, Art. 7(4).
[144]UNCITRAL Model Law, Art 5.
[145]UNCITRAL Model Law, Art. 8(1).
[146]UNCITRAL Model Law, Arts. 9, 11-13, 27.
[147]Born, supra note 19, at §1.04 [B][a].
[148]*Id*.
[149]See Wagners Nouvelle Caledonie Sarl v. Vale Inco Caledonie, [2010] QCA 20 (Queensland Ct. App.)
[150]*Id.*
[151]Cargill Int'l SA v. Peabody Australia Mining Ltd, [2010] NSWSC 887, 31 (N.S.W. Sup. Ct.)

that of the Model Law) does not constitute an implied agreement to opt out of the Model Law for the purposes of §21 of the Commonwealth Act").[152]

1.10. The Riyadh Convention

The Riyadh Arab Agreement on Judicial Cooperation, known as the 'Riyadh Convention,' is a regional multilateral convention among Arab states.[153] It governs foreign awards made in other member states.[154] It is one of the most commonly used conventions in the Middle East for the recognition and enforcement of arbitral awards.[155] The Riyadh Convention entered into force in 1985.[156] Prior to the adoption of the Riyadh Convention in 1983,[157] the Arab League Convention was the governing treaty on foreign arbitral awards. Thus, the Riyadh Convention superseded the Arab League Convention.[158] The provisions of the Arab League Convention, however, continue to apply in respect to those of its member countries that did not join the Riyadh Convention, such as Egypt.[159]

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[152] *Id.*

[153] See Marshall J. Breger & Shelby R. Quast, International Commercial Arbitration: A Case Study of the Areas Under Control of the Palestinian Authority, 32 CASE W. RES. J. INT'L L. 222 (2000) (explaining how the Riyadh Convention applies only to foreign awards made in other Arab member states); see also Abdul Hamid El-Ahdab, Enforcing Foreign Awards in the Middle East, in COMMERCIAL LAW IN THE MIDDLE EAST 323, 331 (Hilary Lewis & Chibli Mallat eds., 1995) (stating that the Riyadh Convention applies to arbitral awards between member states); Reconstruction of Iraq Coalition Provisional Authority Issues Order Number 39 Allowing Foreign Investments in Iraq, INT'L NEWS BRIEF (Pillsbury Winthrop, LLP), Sept. 23, 2003, at 2 (stating that Article 37 of the Riyadh Convention requires member states to recognize and enforce arbitral awards issued in other member states).

[154] Marshall J. Breger & Shelby R. Quast, International Commercial Arbitration: A Case Study of the Areas Under Control of the Palestinian Authority, 32 CASE W. RES. J. INT'L L. 222 (2000) (explaining how the Riyadh Convention applies only to foreign awards made in other Arab member states).

[155] See Nigel Blackbay, Constantine Partasides, et al., supra note 3, at §11.38.

[156] *Id.* The following countries are signatories to the Riyadh Convention: Algeria, Bahrain, Djibouti, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, UAE, and Yemen.

[157] The Riyadh Convention was adopted in April 6, 1983. However, it entered into force in Oct. 30, 1985.

[158] See Marco Torsello, L'Arbitrato Commerciale Internazionale, 15 AM. REV. INT'L ARB. 639, 640 n.10 (2004) (book review) (noting that in some countries, the Riyadh Convention of 1983 replaced the earlier Arab League Convention of 1952); see also Richard Price & John Murkett, Law: Application of Tonnage Limit in UAE—Richard Price and John Murkett of Clifford Chance Assess the Latest Developments in Gulf Shipping Law, LLOYD'S LIST, Oct. 15, 1993, at 13 (stating that the Riyadh Convention was intended to improve the Arab League Convention).

[159] Mark Wakim, Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in The Middle East, 21 N.Y. Int'l L. Rev. 1 (2008). While the Riyadh-Convention is considered the successor convention to the Arab League Convention, the Arab League Convention was never repealed. Thus, its provisions remain in place where they are not superseded by those of a newer convention; i.e. the Riyadh-Convention. Consequently, the Arab

Under the Riyadh Convention, courts are prohibited from examining the substance of disputes referred for award and enforcement.[160] The only permission the Convention grants to courts is that they may only enforce or refuse to enforce an award. It suffices to say that the Riyadh Convention was a step forward for those countries that had not yet ratified the New York Convention.[161] However, with the large number of Middle Eastern states that have now acceded to the New York Convention, the Riyadh Convention is no longer as relevant as it once was.[162]

Importantly, however, and unlike the New York Convention, the Riyadh Convention requires that, to enforce an award made in another Arab country, leave to enforce must be obtained in the country in which the award was made.[163]

1.11. Conclusion

This paper has attempted to analyse the various legal regimes for international commercial arbitration.

In the same connection, this paper has been able to link the past with the present. In other words, it has successfully demonstrated that some provisions in the current international conventions on international commercial arbitration, such as the New York Convention, the Panama Convention, the European Convention on international commercial arbitration, the Model Law, etc are products of some non-existing international conventions on international commercial arbitration.

As seen above, the author has also critically examined in greater details some keys provisions of leading international conventions on international commercial arbitration, such as the New York Convention, the ICSID Convention and the UNCITRAL Model Law.

An award-creditor will encounter little or no difficulty at the enforcement stage, if valid arbitration clauses in an arbitration agreement or in a separate contract or are drafted carefully. This is because case law has demonstrated that, in practice, parties will voluntarily carry out arbitral awards without any objections. It is only when recalcitrant losers refuse to carry out an award that problems do arise. Undoubtedly, the most critical component in dealing with a foreign business is the law of the particular jurisdiction where an arbitration award needs to be enforced.[164]

League Convention remains applicable in respect to Egypt, since the provisions of the Riyadh-Convention are not binding to Egypt as a non-member. For the concept of legal hierarchy between prior and later convention under public international law; see MALCOLM N. SHAW, INTERNATIONAL LAW 91-95 (8th ed. 2017).

[160]See General Counsel's Office of the US Department of Commerce, Overview of Commercial Law in Iraq, Sept. 12, 2003, available at http://www.export.gov/iraq/pdf/iraq_commercial_law_current.pdf (explaining that the Riyadh Convention requires member states to recognize and enforce arbitral awards issued in other member states without reconsidering the merits of the case); see also Saleh Majid, Enforcement of Foreign Judicial and Arbitral Awards in Iraq, MIDDLE E. EXECUTIVE REP. 8, 17 (Sept. 1995) (noting that Article 37 of the Riyadh Convention demands states to enforce arbitration awards from other member states without asserting the merits of the case).

[161]Breger & Shelby, supra note 153, at 22 (declaring that the Riyadh Convention is more progressive than the Arab League Convention).

[162]Wakim, supra note 4.

[163]Blackbay, Constantine Partasides, et al., supra note 3, at §11.38; Riyadh Convention, Art. 37.

[164]Volz and Haydock, supra note 10.

Without the guarantees embodied in the New York Convention, UNCITRAL, or the Panama Convention, business becomes precarious when disputes arise that require arbitration.[165] The need to consult with local attorneys who are well conversant with the laws of the particular country where an arbitral award needs to be enforced may be a pro-active step-before a dispute arises.

[165]*Id.*

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