Judicial Review of Arbitral Awards in International Arbitration

A Case for an Efficient System of Judicial Review

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To strike a balance between the two important considerations of finality and fairness, a degree of judicial scrutiny of arbitral awards seems to be necessary. However, excessive judicial intervention and exercise of extraterritorial jurisdiction over arbitral process and actions for annulment of arbitral awards may undermine international arbitration as a viable and effective alternative dispute settlement mechanism. This article argues that an efficient and harmonized regime of judicial review which could exclusively be exercised by the competent courts at the seat of arbitration will streamline and expedite the enforcement process and thereby increase the efficiency and reliability of international arbitration. Increased international efforts aimed at harmonizing the law and practice with respect to the scope of judicial review and the exclusivity of jurisdiction of the courts of the seat will pave the way for such a harmonized regime of international arbitration which may, in turn, obviate any need for ignoring, through the much criticized practice of enforcement of annulled awards, a judicial decision lawfully rendered to set an arbitral award aside.

1 INTRODUCTION

The consensual nature of international arbitration, as an alternative dispute settlement mechanism, requires, at least at first glance, that it should be free from judicial intervention. When the parties agree for their disputes to be settled through a private forum, judicial review of the award would in principle clash with the parties’ contractual expectation to the extent that they have agreed to submit to the ruling of such a private forum. This approach would support the finality of the arbitral award. However, the binding nature of the arbitral award and its enforceability similar to that of final judgments of national courts call for some degree of judicial scrutiny.

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The necessity of judicial scrutiny of the award is self-evident when the enforcement of the award is sought. A national judge, who is expected to recognize the res judicata effect of an arbitral award, can hardly overlook the issue of basic fairness of the proceedings leading to the award by making sure that the award is free from procedural irregularities and that the recognition of the award would not endanger the public policy of the place where the enforcement is requested. However, the issue of judicial scrutiny of an arbitral award by courts other than the enforcement court has attracted much discussion leading to various views and practices in different states. This controversy includes extreme views at both ends: at one extreme is the view according to which an arbitral award is subjected to a system of review like appeal in national judicial regimes, which may cover both procedural and substantive aspects of a case; at the other extreme, however, lies the view according to which an arbitral award, particularly where it has no connection whatsoever to the place where the proceedings are held, is free from any kind of judicial interference. There are, of course, moderate views, which advocate a certain degree of judicial scrutiny to ensure fairness in the proceedings.

For the purpose of this short survey, the starting point is the assumption that the whole discussion surrounding judicial review of arbitral awards is, theoretically speaking, centred on the clash between the two important considerations of finality of the award, on the one hand, and its fairness on the other. Both considerations are important for the actors at the scene of international business and correspond to their shared pre-contractual expectations. On the one hand, the parties to an international contract who opt for arbitration as a mechanism for settling their disputes look to the finality of the award rendered by the arbitral tribunal, as the reference to arbitration presumably excludes the intervention of national courts. On the other hand, the parties expect an efficient arbitral proceeding in which the basic standards of fair proceedings are adhered to. Such proceedings will presumably lead to a fair arbitral award. In fact, it may safely be assumed that the integrity of the arbitral proceedings, just as finality of the arbitral award, is the shared pre-contractual expectation of the parties.

It is not difficult to notice that these two important considerations require varying measures of judicial intervention and entail different consequences: finality

1 'Public interest' may also be regarded as another important consideration in this regard. It should, however, be noted that the concept of 'public interest', the precise definition and contours of which are flexible and undefined, is, to some extent, incorporated in the two concepts of 'finality' and 'fairness'; i.e., while there is undoubtedly a fundamental public interest in ascertaining the finality of arbitral awards, wider public interests are arguably served if the parties' right to a fair proceeding is duly observed. True, in certain circumstances, the parties' free will to enter into an arbitration agreement is subject to several safeguards as are necessary in the public interest, but, as far as the delineation of the scope of judicial review is concerned, the determinative factor seems to be the delicate balance to be struck between the two apparently rival goals of 'finality' and 'fairness', both figuring prominently in the concept of 'public interest'.

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demands the exclusion of judicial review while fairness calls for at least some degree of public scrutiny. It is not surprising that, when the end result is achieved and the award is rendered, the winner looks for finality, while the loser roars for fairness and to achieve it requests national courts to intervene. Looking at the issue from the point of view of the place where the arbitration is held, finality may enhance the ‘political and procedural neutrality’ of the relevant state; thus, in turn, may make that place a favourite seat for arbitrations. This end may, however, be compromised if, due to excessive judicial review, relitigation of the case before domestic forums becomes necessary. Another important issue to note here is the confidence and trust the actors involved in international business have in arbitration: to increase such trust, adequate procedural safeguards should be in place which would make a degree of judicial scrutiny inevitable; while looking merely at finality, and thereby excluding public scrutiny of arbitral awards, may be extremely harmful to the trust of the business community in international arbitration and counterproductive to the institution of arbitration.

The clash between the rival goals of finality and fairness has rightly been resolved in drafting a model for international arbitration which affords a degree of judicial scrutiny to ensure procedural fairness. This scrutiny, being admittedly inevitable when the enforcement is sought, should also be available to the losing party after the award is rendered. The question, however, is how far courts should be entitled to go when scrutinizing an international arbitral award. In other words, the scope of judicial review reserved for the courts, other than enforcement courts, is a question which needs careful consideration. In fact, it is the skills of the international arbitration community, on the one hand, and the national legislature and judges, on the other, which might bring about a finely balanced formulation of the scope of judicial review, maintaining the equilibrium between the rival considerations of finality and fairness.

Further, it is important to consider the question of which state courts are best-suited for such a function. What primarily comes to mind in response to this question is that the courts of the place where the arbitral proceedings are held, that is, the courts of the seat, are, for theoretical and practical considerations, the most appropriate body to be charged with this task. It will, however, be seen that in certain states, national courts other than those of the seat have, in certain circumstances, interfered with the arbitral proceedings. This interference has sometimes taken the actual form of judicial review of an award rendered outside the state’s territory; in some cases, however, the interference was disguised initially as issuance of

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2 Any reference to place of arbitration throughout this article, unless otherwise indicated, refers to the seat of arbitration in its legal sense.
anti-arbitration injunctions, which, in reality, were aimed at obstructing and undermining the international arbitral process.

The object of this modest survey is to show that (i) international efforts must focus on delineating with more specificity the scope of judicial review of arbitral awards in international arbitration with the aim of achieving the highest possible uniformity in the law and practice in this respect; and (ii) any judicial review, other than the control exercised by enforcement courts, should exclusively be reserved for the courts of the seat.

Three points need to be made at the outset. First, harmonization with regard to the scope of judicial review of arbitral awards should be considered at two levels: legislative uniformity to the extent possible is a must for any attempt at harmonization; at the same time, however, the judicial attitude of judges and lawyers in different national legal systems should never be ignored. Actual uniformity will not be achieved unless the harmonized legislations with respect to judicial review, as is the case in any other area of the law, receive uniform judicial interpretation in practice. Second, exclusivity of the jurisdiction of the courts of the seat should also mean the exclusion of any indirect attempts by courts of other jurisdictions to obstruct international arbitration by, inter alia, exercising jurisdiction to issue anti-arbitration injunctions. Third, harmony in the law and practice of judicial review of arbitral awards, both at the jurisdictional level and in substantive aspects, provides the most satisfactory solution for the predictability, reliability, efficiency and integrity of international arbitration proceedings; such harmony may in turn, it is suggested, obviate the necessity for the practice of enforcing annulled awards, a practice which is itself prone to many theoretical and practical challenges.

The issue will, thus, be discussed in two parts: while the first part considers the scope of judicial scrutiny, with the aim of formulating an efficient model of judicial review, the second part will focus on the jurisdiction of national courts over an action for setting aside an arbitral award. A study of this kind should, inter alia, rely on a comparative analysis of national arbitration laws, which, to the extent necessary for the formulation of a model for judicial review, will be embarked on. Among these national systems, Iranian international arbitration legislation and practice, which is not sufficiently known to the international arbitration community and which has quite a typical and noticeable structure on the subject of judicial review, will also be given due consideration.

2 SCOPE OF JUDICIAL REVIEW

The diversity of national systems for judicial review of arbitral awards, in the absence of an international convention regulating the matter, is a source of concern giving rise to some degree of uncertainty. States are free to apply
whatever measures of judicial control they wish to international arbitrations taking place within their jurisdiction. This has caused some scholars to urge ‘delocalization’ of international arbitration, which leaves arbitral awards subject to no or very little judicial scrutiny by national courts at the seat of arbitration. It is, on the other hand, important to note that the absence or significant erosion of judicial scrutiny would adversely affect the victims of manifestly flawed arbitrations and, in some cases, the interests of the state where the arbitration has taken place. The possibility of judicial scrutiny of an arbitral award at the seat of arbitration enhances the integrity and efficiency of the arbitral proceedings: it reduces the risk of the rendering of arbitrary decisions by some arbitrators, increasing the confidence and trust of the business community in international arbitration. It furthers respect for arbitral awards abroad since it is understood that the award has been rendered subject to judicial scrutiny at the place where it was made. Furthermore, from the arbitrator’s point of view, it will significantly decrease the risk of any improper conduct on the part of arbitrators, and from the point of view of victims of flawed arbitral awards, it will considerably decrease the risk of being subjected to almost endless enforcement actions in different jurisdictions, as many jurisdictions will respect a lawfully rendered judicial decision setting the award aside.

The diversity of national regimes for judicial review should not, therefore, result in a total elimination of judicial scrutiny at the seat of arbitration by advocating a delocalized regime of international arbitration; instead, taking note of the vitality of judicial scrutiny in furthering the efficiency and integrity of international arbitration, the efforts should be aimed at harmonizing the grounds for judicial review of arbitral awards. The diverse approaches in national systems may be categorized as various modalities for judicial review, which, together with a discussion of the subject in the Iranian legal system, may pave the way for formulating a draft for an efficient regime of judicial review.

2.1 Modalities of Judicial Review

Although most states have restricted the scope of judicial review to procedural irregularities and violation of public policy, in certain jurisdictions the grounds for annulment extend, at least to some extent, to revisiting the merits of the dispute.

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At the other end of the spectrum lies arbitral regimes which, under certain circumstances, allow no judicial control over arbitral awards rendered within their territory.

2.1[a] Judicial Review for Procedural Irregularities and Violation of Public Policy

The most popular view, in striking a balance between finality and fairness, is allowing judicial review of arbitral awards for procedural irregularities and violation of public policy. The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, which is the result of attempts to harmonize the law with respect to international arbitration, follows this model. Article 34 of the Model Law provides for an action to set aside as the exclusive means of recourse against an international arbitral award, and allows setting aside on the exhaustive grounds enunciated in that Article. These grounds can be divided into two parts: first, the grounds which need to be raised by a party making the request for annulment, which are: (i) incapacity of a party to the arbitration agreement; or invalidity of the arbitration agreement; (ii) incapacity of a party to the arbitration agreement; or invalidity of the arbitration agreement; (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted may be set aside; or (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or (b) the court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the award is in conflict with the public policy of this State.

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See supra.
The Model Law was adopted on 21 June 1985, by the United Nations Commission on International Trade Law (UNCITRAL). As the name suggests, it was meant as a recommended template for legislatures to consider adopting as part of their national legislation. During the meetings which led to the adoption of the Model Law, some 22 states were represented, together with a further 20 states and international organizations observing. The Model Law has since been adopted in 63 jurisdictions including Iran, with some others modifying their national legislation under the influence of this Model Law. Certain amendments were introduced into the Model Law in 2006, with the main aim of empowering the arbitral tribunal to take measures to protect the 'arbitral process' by preventing a party from resorting to local courts. Certain states have also incorporated the amendments into their national legislations. Any reference to 'Model Law' throughout this article refers to the UNCITRAL Model Law.

This appears from the title of Art. 34 which reads: 'Application for setting aside as exclusive recourse against arbitral award' and also Art. 34(1), which provides as follows: 'Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.' Art. 34(2) of the Model Law provides exhaustively for the following as grounds for setting aside: 'An arbitral award may be set aside by the court specified in Article 6 only if: (a) the party making the application furnishes proof that: (i) a party to the arbitration agreement referred to in Article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted may be set aside; or (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or (b) the court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the award is in conflict with the public policy of this State.'
agreement under the relevant applicable law; (ii) violation of due process; (iii) excess of authority by the arbitral tribunal; (iv) the composition of the arbitral tribunal or the arbitral procedure not being in accordance with the agreement of the parties; second, the grounds which could be invoked ex officio by the court, which are (i) non-arbitrability of the subject matter; and (ii) violation of public policy.

Although states, in adopting the Model Law as part of their legislation, have the flexibility to deviate from the text of the Law, the degree of uniformity brought about by this measure cannot be underestimated. A considerable number of states have, with respect to the judicial review of arbitral awards, adopted the Model Law verbatim. Certain states, which have adopted the Model Law or were influenced by it in their legislation, having remained faithful to the main idea of confining judicial review to the procedural integrity of the award, expanded or restricted the specific grounds of recourse to national courts within that structure.

Among the national laws that have slightly restricted the grounds for judicial review, one may refer to the French New Code of Civil Procedure. French legislation confines the scope of judicial review to: (i) the absence, invalidity or expiry of an arbitration agreement; (ii) irregular constitution of the arbitral tribunal; (iii) excess of authority; (iv) violation of due process; and (v) conflict of the award with international public policy. These grounds have been held to be exhaustive: the Cour de Cassation in a 1987 decision held that ‘the role of the Court of Appeals, seized by virtue of Articles 1502 and 1504 of the New Code of Civil Procedure, is limited to the examination of the grounds listed in these provisions’. The Swiss Federal Statute on Private International Law is another example. Article 190(2) of that Statute, which normally applies to international arbitrations held in Switzerland, sets out a slightly limited scope for judicial review, as compared to

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12 Art. 1502 of the Code (through cross-reference to Art. 1502).
14 Art. 1904 of the Code (through cross-reference to Art. 1502).
16 The provisions of the Federal Statute on Private International Law apply to ‘all arbitrations if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland’ (Art. 176(1) of the Statute). It has to be noted that the parties, by an agreement in writing, may exclude the application of the Statute and may alternatively subject the arbitral proceedings to cantonal provisions on arbitration (Art. 176(2)). In the latter case, the provisions of Intercantonal Arbitration Convention (Concordat) of 27 Aug. 1969, would be applicable. See ch. 25 Switzerland, in Global Legal Group, The International Comparative Legal Guide to International Arbitration (2005). Such an exclusion should really be expressed in terms: in a decision rendered in 2001 (Decision AP.243/2000 of Jan., 8 2001 2 Asa Bull. 335 (2010)), the Federal Supreme Court did not find an arbitration clause with the following terms clear and specific enough to meet the requirements of a valid exclusion: ‘All disputes . . . shall be finally and exclusively settled under the rules of arbitration of the Swiss “Konkordat über die Schiedsgerichtsbarkeit” of March 27/August 27, 1969 by three arbitrators appointed in accordance with rules.’ See 2 Asa Bull. 268 (2010). The Intercantonal Concordat provides for more expansive judicial review, which includes, inter alia, annulment of the award for ‘arbitrariness’. See infra.
Article 34 of the Model Law, remaining, however, within the framework of procedural integrity of the award.

Some states have opted for a rather expanded version of the judicial review of arbitral awards. For example, the Arbitration Act of Finland, setting out the grounds for nullity of an arbitral award, in addition to non-arbitrability of the subject matter and being contrary to the public policy of Finland,15 refers to two further grounds: ‘(3) if the arbitral award is so obscure or incomplete that it does not appear in it how the dispute has been decided; or (4) if the arbitral award has not been made in writing or signed by the arbitrators’.16

2.1[b] Extension of Judicial Control to Review of the Merits

In certain arbitral regimes, the scope of judicial review, in addition to scrutinizing the procedural integrity of the arbitral award, has been extended to a right to request the substantive review of the award’s holdings on the legal merits. While this is mostly the case in domestic arbitrations, in a number of states, the possibility of substantive review of the award has also been extended to international arbitrations.

England is the most prominent example of this approach: the English Arbitration Act 1996, in addition to stipulating, in sections 67 and 68, certain grounds for judicial scrutiny of the award for procedural irregularities,17 in section 69 envisages the possibility of appeal on a question of law. This section provides that '[u]nless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings’.18 It should be noted, however, that an appeal on a question of law is considerably limited in scope by the fact that: (i) it is possible only on questions of the law of England and Wales, and questions of the law of Northern Ireland;19 (ii) it is not usually available as a matter of course, but a leave to appeal must be applied for within the time limit provided for in section 70(3),20

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15 These grounds are almost identical to the grounds for setting aside an award under art. 34(2)(b) of the Model Law.
16 Arbitration Act of Finland (967/1992 including amendments up to 460/1999), s. 40(1).
17 These have been summarized as ‘want of substantive jurisdiction’ and ‘serious irregularity,’ the latter intended to mean ‘irregularity of a kind listed in section 68(2) which the court considers has caused or will cause substantial injustice to the applicant. The list includes all the forms of irregularity listed in Article 34 of the Model Law and a number of others which the Model Law omits’. Goode, supra n. 7, at 37–38; see also David St. John Sutton, Judith Gill & Matthew Gearing, Russell on Arbitration ¶¶ 8-072 et seq. (23rd ed., 2007).
18 For a detailed account see id. ¶¶ 8-119 et seq.
19 English Arbitration Act 1996, s. 82(1), provides that “question of law” means . . . (a) for a court in England and Wales, a question of the law of England and Wales, and . . . (b) for a court in Northern Ireland, a question of the law of Northern Ireland.’
20 Id. s. 69(2)(b), unless all the other parties to the proceedings agree: id. s.69(2)(a).
(iii) the leave is granted only subject to certain conditions; and (iv) any available arbitral process of appeal or review and any available recourse under section 57 (correction or additional award) ought to have been exhausted. Further, section 69 is not mandatory; rather, it is open to the parties to exclude the possibility of such an appeal, either directly or through incorporation of the rules of an arbitral institution by which the parties may validly exclude the possibility of recourse to the courts. This exclusion may be made in the arbitration agreement or subsequently, and the parties ‘are taken to do so if they agree to dispense with reasons for the award’. 23

The possibility of appeal on a question of law, though hindered by many strict conditions such that leave may rarely be granted, is subject to severe criticisms amongst British scholars who forcefully argue that it is not compatible with the requirements of arbitration as a private, confidential and speedy mechanism for the resolution of commercial disputes. Nor, they maintain, is it appropriate for the purpose of ‘enrichment of English jurisprudence’ on questions of law, as the expectations of the parties who opt for arbitration should not be frustrated by being made cannon fodder for the enrichment of English jurisprudence for the benefit of other parties in future cases. 25

In the United States, apart from the statutory grounds for annulment contained in the 1925 Federal Arbitration Act, many federal courts have recognized ‘manifest disregard of the law’ as a non-statutory basis for annulment of arbitral awards. This concept, introduced into US law as a possible additional ground for annulment of arbitral awards through a dictum in Wilko v. Swan, 29 has a hybrid nature and provides a possibility for a national court to revisit the merits of a dispute on a point of law.

21 Id. s. 69(3); see Goode, supra n. 7, at 38.
22 English Arbitration Act 1996, s. 70(2).
23 Goode, supra n. 7, at 39.
24 The conditions are such that the importance of this review has been described as ‘considerably limited’. Hamid G Gharavi, The International Effectiveness of the Annulment of an Arbitral Award 34 (2002).
26 Id. at 40–41.
27 The statutory grounds focus on the procedural integrity of the award. 9 U.S.C. s. 10(a) of the Federal Arbitration Act details these grounds as follows: ‘(1) where the award was procured by corruption, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.’
28 See, e.g., Williams v. Cigna Fin. Advisors, Inc., 197 F.3d 752 (5th Cir. 1999).
29 346 U.S. 427 (1953). It was stated in this case that ‘the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation’. Id. at 436–37.
decided by an arbitral tribunal. Built upon the notion of arbitrator’s excess of authority, this ground has also been applied to international arbitral awards rendered in the United States. Although after the landmark decision of the US Supreme Court in *Hall Street Associates, LLC v. Mattel, Inc.*, there has been some doubt as to whether this ground still exists as a basis for annulment, some federal courts still adhere to the idea that ‘manifest disregard’ survives as a distinct non-statutory ground for annulment.

Finally, a reference should be made to the Swiss Intercantonal Arbitration Concordat, which in some cases might be applicable to international arbitrations held in Switzerland. The Concordat, as compared to the Swiss Federal Statute on Private International Law, provides for more expansive grounds for judicial scrutiny of arbitral awards, including annulment for ‘arbitrariness’. Article 36(f) of the Concordat defines ‘arbitrariness’ to include ‘evident violations of law or equity’. Again, just like the concept of ‘manifest disregard of the law’, the notion of ‘arbitrariness’, having a hybrid nature, provides a possible avenue for the reconsideration of the merits of the dispute by the reviewing court. It should be noted, however, that unlike the English concept of ‘appeal on a point of law’, both notions of ‘manifest disregard of the law’ and ‘arbitrariness’ ‘imply something beyond a simple mistake, but not necessarily clear excess of authority’.

2.1[c]  No Judicial Control of Arbitral Awards

Certain arbitral regimes, for some theoretical and practical reasons, advocate the idea of elimination of judicial review by the courts of the seat. This category includes states which have experienced, at least at some point of time, the mandatory elimination of judicial review, as well as those that allow voluntarily entered into agreements to exclude the possibility of judicial scrutiny by the courts of the seat.

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30 See, e.g., *Alghanim v. ToysRUs*, 126 F.3d 15 (2d Cir. 1997).
31 128 S. Ct. 1396 (2008). It was stated in this case that ‘[m]aybe the term “manifest disregard” was meant to name a new ground for review, but maybe it merely referred to the s.10 grounds collectively, rather than adding to them. Or, as some courts have thought, “manifest disregard” may have been shorthand for s.10(2)(3) or s.10(2)(4), the subsections authorizing vacatur when the arbitrators were “guilty of misconduct” or “exceeded their powers.” We, when speaking as a Court, have merely taken the Wilko language as we found it, without embellishment.’
33 See supra n. 14.
34 Park, supra n. 3, at 597.
2.1[c][i]  Mandatory Elimination of Judicial Review

The idea of eliminating the judicial control of international arbitral awards was first introduced and experienced, for a certain period of time, in Belgian law, under which the courts were prevented from any judicial scrutiny of the award in arbitrations taking place in Belgium, as the seat of arbitration, if none of the parties was a national or resident of Belgium. Article 1717(4) of the Judicial Code of Belgium, introducing this shift in 1985, provided: ‘Belgian courts can take cognizance of an application to set aside only if at least one of the parties to the dispute decided in the arbitral award is either a physical person having Belgian nationality or residing in Belgium or a legal person formed in Belgium or having a branch or some seat of operation in Belgium.’

The move, which was inspired by the idea that a system of ‘mandatory “non-review” of awards’ and ‘a completely laissez-faire system’ would attract arbitration, had its roots in French case law, which, for a short period of time, advocated the idea that ‘a State would have no entitlement, or indeed no benefit, to review awards rendered on its territory as long as neither party is seeking enforcement of the award in that State’. It had, indeed, been acknowledged by the Paris Court of Appeal in Götaverken that an ICC award rendered in a dispute between Libyan and Swedish parties in France ‘is in no way anchored in the French legal system as both parties are foreign and the contract was concluded and was to be performed abroad’. The court, based on the understanding that the ‘location where arbitral proceedings take place, which is chosen exclusively to ensure neutrality, was not significant and could not be considered to be an implicit manifestation of the parties’ will to subject themselves, even on a subsidiary basis, to French procedural law’, was clearly of the view that such an award could not be challenged in France. It is important to note that such a judicial interpretation raised concerns that international arbitral awards rendered in France, due to the lack of judicial scrutiny, might not be recognized and enforced by foreign courts. Furthermore, these concerns were compounded by the fact that the international business community was also apprehensive of the total lack of judicial scrutiny, just as it seemed to be concerned about the other extreme which provides for a possibility of appeal against arbitral awards extending to the judicial review of the merits; and it understandably avoids selecting such states as the seat of arbitration. All these concerns led, on 12 May

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34 Id. at 599.
35 Emmanuel Gaillard, Legal Theory of International Arbitration 63-64 (2010).
37 See Park, supra n. 3, at 599.
1981, to an International Arbitration Decree in France which allowed a certain degree of judicial scrutiny of international arbitral awards.

For the same reasons, the Belgian experience also proved to be a failure. Contrary to the expectation that the move would attract arbitration, the business community, in practice, was disinclined to choose a state, as the seat of arbitration, where no judicial control of international arbitral awards existed. Thus, the Belgian legislature adjusted its position and introduced, on 19 May 1998, an amendment to the Judicial Code which, in effect, by allowing a certain degree of judicial review to preserve the procedural integrity of the arbitral proceedings and the award, provided for a safety net as the default rule.40

2.1[c][ii] Exclusion of Judicial Review by Agreement

The possibility for the parties to opt-out of any judicial review has been recognized in certain jurisdictions, mostly where the parties have no connection with the state concerned except for that state being the seat of the arbitration. Switzerland is among the first states to take such a step: Article 192(1) of the Swiss Federal Statute on Private International Law affords the parties an opportunity to conclude an express exclusion agreement, waiving or limiting the scope of any judicial scrutiny of the award, where neither party has a Swiss residence or place of business.41

Belgian law, after the failed experience of mandatory elimination of judicial scrutiny, adopted, in the amendments introduced in 1998, the solution proposed by the Swiss Statute. Article 1717(4) of the Belgian Judicial Code provides for the possibility of wholly excluding the right to initiate an action for setting aside where none of the parties are Belgian nationals or have their normal residence (in case of physical persons) or place of business (in case of legal persons) in Belgium.42

This possibility, in line with the Swiss Statute, has also been adopted in certain other jurisdictions, the most extreme of which is Panama where the parties in an

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39 The grounds for setting aside are listed in art. 1704 of the Judicial Code.
40 Art. 1717(4) of the Judicial Code provided, under certain conditions, for the possibility of exclusion of any judicial review by an express agreement of the parties: ‘The parties may, by an explicit declaration in the arbitration agreement or by a later agreement, exclude any application for the setting aside of an arbitral award, in case none of them is a physical person of Belgian nationality or physical person having his/her normal residence in Belgium or a legal person having its main seat or a branch office in Belgium.
41 This article provides: ‘If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express agreement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the grounds listed in Art. 190(2).’
42 See supra n. 40.
international commercial arbitration may, by a direct agreement or by a reference to arbitration rules, exclude the action for annulment.\textsuperscript{44}

Although the mandatory elimination of judicial review of international arbitral awards may indicate the willingness to abandon ‘the idea that the source of validity of arbitral awards . . . lies in the legal order of the seat’,\textsuperscript{45} it is doubtful whether providing for the possibility of exclusion of judicial scrutiny by the parties has such an implication. The particular requirements of international commerce and the need for speedy resolution of disputes may convince a legislator to adopt a solution by which the parties may opt-out of any possibility for judicial review by the courts of the seat. This does not, it seems, \textit{necessarily} indicate the willingness on the part of national legislatures to subject international arbitration to a transnational legal order.

\subsection*{2.2 Judicial Review of Arbitral Awards under Iranian Law}

The first significant regulation of Iranian arbitration law appeared as a chapter of the Civil Procedure Code (CPC) of Iran adopted in September 1939. This law was equally applicable to domestic and international arbitrations taking place in Iran. Despite the amendment of the CPC on 10 April 2000, that part of the Code which regulated arbitration, though in need of serious reform,\textsuperscript{46} remained almost intact. Before this amendment, on 17 September 1997, Iran had reformed its legislation with regard to international arbitration by enacting the 1997 International Commercial Arbitration Act (1997 Act), which is modelled on the UNCITRAL Model Law on International Commercial Arbitration.\textsuperscript{47} This had, to a large extent, brought Iran’s arbitration-related legislation in line with international standards. Further, in 2001 Iran acceded to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards and the necessary law was enacted on 10 April 2001, to make the provisions of the Convention effective and enforceable in the country. These two legislative reforms overhauled Iranian law with respect to international arbitration. Indeed, as far as the legislation is concerned, Iran embraced the new international approach and norms. A reference should also be made to more than fifty bilateral investment treaties (BITs) concluded by Iran in which international arbitration has invariably been accepted as the most notable dispute settlement mechanism.

\textsuperscript{44} See Decree No. 5 (July 8, 1999), art. 36, establishing a general regime for arbitration, conciliation, and mediation (\textit{Official Gazette} 23837, July 10, 1999).
\textsuperscript{45} Gaillard, \textit{supra} n. 36, at 66.
\textsuperscript{46} For the shortcomings of the CPC with respect to international arbitration, see Seifi, \textit{infra} n. 48, at 6–7.
\textsuperscript{47} With respect to domestic arbitration, the applicable law, being still the provisions contained in the CPC, is yet to be reformed.
It is thus important to note, for the purpose of this survey, that international commercial arbitration in Iran is, at present, regulated by the 1997 Act, which has been modelled on the UNCITRAL Model Law. Understandably, however, in some aspects, the Iranian legislature has, to some extent, departed from the precise text and wording of the Model Law to make it more adaptable to local requirements. Among these departures, the provisions of the 1997 Act on judicial review of arbitral awards are the most notable. The Iranian legislature, being inspired by the two sets of grounds for setting aside as laid down in Article 34(2)(a) and (b) of the Model Law, that is, the grounds which must be raised by the requesting party and the grounds which may be raised ex officio by the court, has devoted two separate Articles to the issue: Article 33, which deals with the request for annulment, and Article 34 of the 1997 Act, which sets out the instances in which the award is null and void \textit{ab initio}. The approach favoured by the Iranian legislature is to expand, to some extent, the grounds for judicial scrutiny of arbitral awards, as compared to Article 34 of the Model Law. This expansion, in effect, leaves open, at least in theory, the possibility of revisiting the merits of the case by the reviewing court in certain instances. This section will, therefore, focus on the grounds for annulment and nullity \textit{ab initio} of the award under Iranian law.

2.2[a] \textbf{Grounds for Annulment}

Article 33 of the 1997 Act enumerates the grounds upon which a party may request the competent court to set the award aside. This request must be filed within a period of three months from the date on which the award (including any corrective, additional, or interpretive award) has been notified to the parties. Article 33(1) of the 1997 Act provides:

The arbitration award may be set aside by the court specified in Article 6, at the request of one of the parties on the following grounds:

(a) one of the parties was under legal incapacity;
(b) the arbitration agreement is not valid under the law to which the parties have subjected it; and in the case of silence of the applicable law, it is contrary to the explicit provisions of Iranian law;
(c) the regulation of this Act in respect of notification of the appointment of the arbitrator or of the request for arbitration were not observed;
(d) the party making the application, for reasons beyond its control, was unable to present its case;

the arbitrator’ has made the award in excess of its authority. If matters submitted to
arbitration can be separated, only that part of the award which is in excess of authority
is invalid;

(f) the composition of the arbitral tribunal or the arbitral procedure was not in accordance
with the arbitration agreement or in case of its silence or non-existence, was not in
accordance with the provisions of this Act;

(g) the arbitration award includes the positive and decisive vote of the arbitrator whose
challenge has been sustained by the authority mentioned in Article 6;

(h) the arbitration award is based on a document the forgery of which has been established
in accordance with a final judgment;

(i) after the award was rendered, documentary evidence is discovered, which would
constitute the proof of the applicant’s case and it is established that the other party had
concealed such evidence or caused it to be concealed.

The grounds enunciated in paragraphs (a) to (f), with slight insignificant variations50 are, in effect, identical to the annulment grounds set out in Article
34(1)(a) of the Model Law. These grounds, as contemplated by the Model Law,
invariably relate to the procedural integrity of the award; they cover essentially
disregard for basic procedural fairness and excess of jurisdiction. However, three
new grounds have also been introduced by the Iranian legislature, which are
worthy of a brief review here.

Article 33(1)(g) of the 1997 Act contemplates a situation where the award is
based on the decisive vote of an arbitrator whose challenge has been sustained by the
authority competent to decide such a challenge. No doubt a decision sustaining the
challenge to an arbitrator reveals the fact that the award had been rendered by an

50 The reference to incapacity in art. 33(1)(a) of the 1997 Act is of a general nature, unlike the similar
provision in art. 34 of the Model Law which refers only to incapacity of a party to the arbitration
agreement. The difference may gain significance in cases of assignment and succession. The party to an
arbitration agreement, at the time such an agreement is made, may be under some kind of incapacity to
enter into an arbitration agreement under the relevant applicable law; while the successor or the assignee
may not necessarily be under any incapacity. The ground for annulment, being specifically relevant to the
incapacity of a party to the arbitration agreement, will allow the successor or assignee, in such cases, to still
benefit from the arbitration agreement (see Seifi, supra n. 48, at 32–33). However, it has to be admitted
that, in practice, this is of less significance; because: (a) the general incapacity of one of the parties is less
likely to be successfully invoked in such cases as a ground for annulment; and (b) a reference to the validity
of the arbitration agreement, referred to in Art. 33(1)(b) of the 1997 Act, covers, inter alia, the lack of
capacity of one of the parties to such an agreement.

The other slight difference, which is probably due to poor drafting rather than an intended
departure from the Model Law (see Seifi, supra n. 48, at 16–18), relates to the second limb of art.
33(1)(b) of the 1997 Act which, at first glance, may imply the application of the law of the situs (i.e.,
Iranian law) as to the question of validity of the arbitration agreement only in a case where there is a
lacuna in the law chosen by the parties to govern the validity of such agreement. This interpretation,
which is a merely textual reading of the relevant paragraph, leads to an absurd result and, contrary to
the widely accepted approach in modern arbitration laws, limits, unnecessarily, the scope of application
of lex arbitri to the question of validity of the arbitration agreement. The correct approach seems to be
that, in line with the Model Law, the second limb of this paragraph becomes applicable when the
parties have failed to indicate the law governing the validity of the arbitration agreement.
arbiter who lacked the required degree of independence or impartiality. Such a
finding puts the integrity of the arbitral tribunal into serious question. Indeed, the
lack of independence or impartiality should be considered as a violation of
procedural due process. Although the Model Law has not explicitly referred to this
issue as a separate ground for annulment, other grounds for setting aside, such as the
lack of due process or violation of public policy, may serve to deal with this
procedural defect. In any event, the initiative on the part of the Iranian legislature to
treat bias or lack of independence as grounds for annulment is in line with the efforts
aimed at maintaining the procedural integrity of the arbitration process to ensure
procedural fairness.

The last two grounds for annulment, as laid down in subparagraphs (h) and (i),
are indeed among the grounds for revision, stricto sensu, of a judgment having res
judicata effect in many legal systems, including that of Iran. The introduction of
these instances, as possible grounds for setting aside an arbitral award, clearly opens up
the possibility of revisiting the merits of the dispute by national courts, which seems
inconsistent with the very purpose of limiting the grounds for annulment to
procedural fairness and due process in order to strike a fine balance between finality
and fairness. It may, however, be argued that the discovery of the fact, based on a final
judgment, that the award is based on a forged document, as well as the discovery of a
document having a decisive effect on the outcome of the case which has been
concealed by the other party, is a clear signal of a serious defect in the arbitral award,
which cannot be disregarded. Arguably, the legal system of the seat cannot be
indifferent to such an obvious defect. Given that these grounds are only invoked in
exceptional circumstances and the possibility of judicial review in such extreme cases
enhances the confidence of not only the business community but also all the
concerned parties in international arbitration as a reliable dispute settlement
mechanism, it is submitted that maintaining the possibility of revisiting the merits of
the dispute in such cases should not be a cause of concern for the arbitration
community.

It is notable that such possibility has also been adopted in some modern
arbitration laws such as Belgian law which, at some point, had unsuccessfully
embraced the extreme view of eliminating judicial review in international arbitration

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51 This is also true with respect to arbitration laws of certain other countries, such as France and Switzerland;
unlike the Federal Arbitration Act of the United States in which 'evident partiality or corruption in the
arbiter, or either of them' has expressly been regarded as a ground for annulment. Federal Arbitration
Act, s. 10(a)(2).
52 Park, supra n. 3, at 597 n. 9.
53 Under art. 426 of the Iranian Civil Procedure Code of 2000, these are among the exceptional grounds
under which a judgment having res judicata effect may still be judicially reviewed.
54 See supra.
for the purposes of ensuring finality. Article 1704(3) of the Belgian Judicial Code provides:

An award may also be set aside:

(a) if it was obtained by fraud;
(b) if it is based on evidence that has been declared false by a judicial decision having the force of res judicata or on the basis of evidence recognized as false;
(c) if, after it was made, a document or other piece of evidence is discovered which would have had a decisive influence on the award and was withheld through the act of the opposing party.

Moreover, in some other jurisdictions, grounds like fraud, forgery and discovery of decisive documents withheld by the other party are in practice covered by certain, apparently procedural, grounds like lack of due process, inability to present the case or violation of public policy.

Finally, a reference should be made to Article 33(2) of the 1997 Act which provides for the possibility of rehearing the case by the arbitral tribunal in case of forgery or discovery of decisive documents concealed by the other party. This Article provides:

With respect to the grounds mentioned in subparagraphs (h) and (i) of this Article, the party who has suffered a loss due to forgery or concealed document, may, before making a request for annulment, request the arbitrator to rehear the case, unless the parties have agreed otherwise.

This provides for a possibility of revision by the arbitral tribunal itself, which may further obviate any concern resulting from expansion of the scope of judicial review in the 1997 Act as compared to the Model Law.55

2.2[b] Nullity Ab Initio of Arbitral Award

The grounds for nullity have been dealt with separately in the 1997 Act. As an introductory remark, it should be noted that this is not only the characteristic of the Iranian Arbitration Act. Certain other jurisdictions have also followed this practice, among which Finland is a clear example. The Finnish Arbitration Act of 1992 devotes two different articles to the annulment and nullity of arbitral awards:

55 There is, of course, an obvious technical defect in the 1997 Act relating to the time limit within which an action to set aside may be brought before a competent court. According to Art. 33(3), this time limit is three months from the date of notification of the award, which apparently is invariably applicable to all annulment grounds enunciated in Art. 33(1); while the nature of the grounds introduced in subparagraphs (h) and (i) are such that any time limit with respect to them should start to run from the date of notification of the final judgment as to the forgery (with respect to the ground in (b)) and discovery of concealed documents (as to the ground in (i)). Compare with the provisions of art. 1707(3) of the Belgian Judicial Code.
While section 41 sets out the grounds for setting aside arbitral awards, section 40 deals only with nullity.56

Article 34 of the 1997 Act sets out instances where the arbitral award is essentially void and non-enforceable. This Article, having covered the grounds for annulment laid down in Article 34(2)(b) of the Model Law, provides a further ground for nullity. The Article reads:

An arbitral award is essentially void and non-enforceable in the following instances:

1. if the subject-matter of the dispute is non-arbitrable under Iranian law;
2. if the award is contrary to public policy or good morals of Iran and/or the mandatory provisions of this Law;
3. if the arbitral award, rendered with respect to immovable properties situated in Iran, is in conflict with the mandatory laws of the Islamic Republic of Iran and/or the content of valid official (notarial) documents, unless as to the latter the arbitrator has the authority to act as amiable compositeur.

Non-arbitrability of the subject matter and the award being in violation of public policy are, again with few insignificant differences, 57 almost identical to what are provided by Article 34(2)(b) of the Model Law as grounds for setting aside the award which may be raised, ex officio, by the competent court. However, the third instance of nullity is unique to the 1997 Act and has, apparently, no equivalent in any other jurisdiction. From a theoretical point of view, this provision may be subject to criticism, as it leaves open the possibility of reconsideration of the merits of the case, which does not seem appropriate in an efficient arbitration regime.58 However, the significance of this provision, in practice, is seriously questionable. The 1997 Act, as emphasized in Article 2(1), applies to ‘disputes in international commercial arbitration’. Although the term ‘commercial’ has not been defined in the 1997 Act itself, it is clear from the Iranian Commercial Code59 that transactions with respect to immovable properties are not regarded as commercial in nature.

56 Finnish Arbitration Act, s. 40(1), provides: ‘An award shall be null and void: (1) to the extent that the arbitral tribunal has in the award decided an issue not capable for settlement by arbitration under Finnish law; (2) to the extent that the recognition of the award would be contrary to the public policy of Finland (ordre public); (3) if the arbitral award is so obscure or incomplete that it does not appear in it how the dispute has been decided; or (4) if the arbitral award has not been made in writing or signed by the arbitrators.’

57 The difference relates to a reference, in art. 34(2), to ‘good morals’ and ‘mandatory provisions’ of the 1997 Act. The significance of such a reference is questionable due to the fact that: (i) in terms of commercial relations which are covered by the 1997 Act, the concept of ‘good morals’ is almost invariably covered by the notion of ‘public policy’; and (ii) being contrary to the ‘mandatory’ provisions of the 1997 Act is presumably embraced by other provisions of the Act which regulate basic procedural irregularities and observance of due process.

58 In fact, the provision has its roots in the historical sensitivity shown by the Iranian legislature during decades, since the Qajar era, on the issue of ownership of immovable properties by foreign nationals, particularly in the border areas. A detailed analysis of the issue falls outside the scope of this article.

59 Iranian Commercial Code, arts. 2–5.
Thus, the introduction of this subparagraph in Article 34 of the 1997 Act has rightly given rise to some degree of surprise amongst the commentators. It may be assumed that, in rare circumstances, a dispute of a commercial nature may also include, as an ancillary point, an issue related to a particular piece of immovable property situated in Iran. In such a situation the decision made by the arbitrator should not be in contradiction with the mandatory laws of Iran and the contents of valid notarial documents. Such an issue, however, may well be covered by other grounds for setting aside the award, as set out in Articles 33 and 34 of the 1997 Act. It can, therefore, be safely concluded that this subparagraph does not have a significant scope of application; and thus should not give rise to any concern as far as the issue of expansion of the scope of judicial review is concerned.

As a final remark, it should be noted that the time limit provided for in Article 33(3) of the 1997 Act for an application to set aside the award has no relevance to the nullity of the award as set out in Article 34. In other words, ‘[w]henever a party makes an application for recognition and enforcement of the award made in accordance with the Act, the Iranian court would be entitled to consider the relevance of Article 34 of the Act’. Such is the case in the Finnish Arbitration Act under which an action to set aside may be brought within the time limit of three months from the date of notification of the award, while an action requesting that the court declare the nullity of the award, on the grounds provided for in the Finnish Act, is apparently not subject to this time limit. The satisfactory solution, however, would be to make the time limit for the admissibility of any action for annulment applicable, also, to actions requesting the court to declare the award null and void; while the court at the enforcement stage is, no doubt, entitled to invoke the grounds for nullity to refuse recognition and enforcement if such a request has not been made by the losing party within the time limit.

2.3 A CASE FOR AN APPROPRIATE MODEL OF JUDICIAL REVIEW

As pointed out earlier, striking a fine balance between the conflicting objectives of finality and fairness requires a degree of judicial scrutiny of arbitral awards. The idea of elimination of judicial review, and reserving any judicial control only for the enforcement courts, has serious drawbacks for the international business community and may also be regarded as a defect for an efficient regime of

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60 See, e.g., Seifi, supra n. 48, at 33–34.
61 Id. at 34.
62 Arbitration Act of Finland (967/1992, including amendments up to 460/1999), s. 41(3).
63 Id. s. 40, see supra n. 56.
64 See supra.
65 See supra.
international arbitration. The failed experience of such elimination in Belgian law\textsuperscript{66} is clear testimony to this fact. However, expansion of judicial review so that the merits of the case, even to the extent relating to a point of law, could be revisited by national courts seems to be undesirable. The agreement of the parties to settle their disputes through a private dispute settlement mechanism should be respected under the universally accepted, and vitally important, legal principle of \textit{pacta sunt servanda}. Excessive intervention of national courts, even under the guise of achieving substantive fairness, is in contradiction with the objective expectation of the parties who submit their disputes to arbitration, as opposed to courts, and there seems to be no justification to deny the parties their contractually agreed upon expectation.\textsuperscript{67} Nor is it an appropriate justification to allow judicial intervention on legal, as opposed to factual, issues in order to provide an opportunity for the courts to clarify and develop certain aspects of law in a given state. As rightly pointed out by Professor Goode, ‘[t]here is absolutely no reason why the clarification and development of . . . commercial law should not be left to the initiative of litigants, of whom there is no perceptible shortage’.\textsuperscript{68}

Thus, an appropriate model of judicial review seems to lie in the recognition of the necessity of judicial review, but basically limiting it in scope to procedural irregularities and violation of due process. The Model Law has clearly been based on this idea, and its success in providing an appropriate platform for achieving uniformity in this regard should not be underestimated. It is true that the legislature in certain countries, in adopting the Model Law, has departed from the framework proposed by the Model Law for judicial review of arbitral awards; but nonetheless the uniform trend in keeping the judicial scrutiny limited to procedural fairness should not be overlooked. This by itself is indeed a tremendous achievement and it is to be hoped that increased international efforts will lead to more harmony with respect to the scope of judicial scrutiny.

While the Model Law provides for an appropriate platform in delineating the scope of judicial review, in order to strike a fine balance between the important considerations of finality and fairness and to facilitate achieving an efficient and harmonized regime of judicial scrutiny, certain points should be taken into consideration. It is questionable whether public policy should remain as a ground for setting aside. Further, it seems important for an efficient system of judicial review to

\textsuperscript{66} See supra.

\textsuperscript{67} Indeed it has been recognized as one of the underlying principles that has formed the global perception as to arbitration that ‘in agreeing to arbitration, parties expect not to have to fight any issues in court, and courts must therefore enforce arbitration agreements, and not interfere: arbitration should be final, binding, and as far as possible, independent and insulated from the courts’. See Toby T. Landau, \textit{International Arbitration and Pakistan’s State Responsibility: Refining the Role of the Court}, 3–4, http://www.supremecourt.gov.pk/jjc/Articles/8/3.pdf (accessed date?).

\textsuperscript{68} Goode, supra n. 7, at 47.
include the possibility of action in revision in cases of fraud, forgery and concealment
of documents of substantial importance. A strong case can also be made in favour of
expressly including arbitrator bias and corruption as possible grounds for annulment.
Finally, in line with legislative reform, the ‘judicial attitude’ in different countries
should be given due consideration. Below is a brief discussion of these issues in turn.

2.3[a] Elimination of Public Policy in General as a Ground for Setting Aside

There is much to be said as to whether it is really necessary, in international
arbitration, to consider the violation of public policy of the situs as a ground for
setting an arbitral award aside. While such a control should be, and has in fact
been, acknowledged for the enforcement courts for the obvious reason that they
are requested to recognize the res judicata effect of a foreign arbitral award within
their territory and are thus justifiably entitled to refuse recognition and en-
forcement where the award is contrary to public policy, it is not clear why other
courts should be empowered to set aside an award for violation of public policy.
The seat of arbitration, in most international disputes, is knowingly chosen by the
parties for its neutrality, facilitation of international arbitration and geographical
convenience. It may otherwise have no relevance to the parties and the formation
and performance of their contract. It is, thus, difficult to justify why the award,
having been contrary to public policy of the seat, should be set aside by the
competent courts of that state.

The importance of the matter is highlighted by the fact that the concept of
‘public policy’, by its nature, is a fluid and vague notion, subject to variations from one
state to another. Added to this is the possibility of variant interpretations as to what
constitutes public policy from the perspective of a certain state. All these factors
contribute, or have at least the potential of contributing, to non-harmonious
practices, which bring unpredictability into the field of international arbitration,
while the Model Law has been based on the admirable notion of bringing about
uniformity in this field.

One possible solution to this problem might be to resort to the notion of
so-called international public policy and allow the courts of the seat to set aside an
award in international arbitration only when the award is contrary to ‘international’
public policy. This was indeed recommended, albeit in the context of enforcement of
foreign arbitral awards, by the International Arbitration Committee of the Inter-
national Law Association, adopted at the ILA’s Seventieth Conference in New
Delhi in April 2002. The Committee, having considered the varying legislations
and judicial practices of different countries, concluded that the notion of ‘public

69 Or considering it as a ‘nullity’ as is the case in certain jurisdictions such as Finland and Iran. See supra.
policy’ has been applied restrictively by legislatures and courts; and recommended the application of ‘international public policy’, meaning ‘that part of a public policy of a State which, if violated, would prevent a party from invoking a foreign law or foreign judgment or foreign award’.

This is, in fact, the case in France where the conflict of the award with ‘international public policy’ has been regarded as a possible ground for annulment. Commentators have noted that the notion of ‘international public policy’ refers to ‘the French conception of international public policy or, in other words, the set of values of which could not be tolerated by the French legal order, even in international cases’.

Although a tendency towards the more restrictive approach of ‘transnational public policy’ may be spotted in some judicial decisions, it has to be acknowledged that this conception has not received a widespread recognition. Such an approach was reflected in a 1990 decision of the Paris Court of Appeal in Fougerolle where the court, expressing a degree of scepticism in terms of application of this concept, referred to the existence of a ‘truly international and universally applicable’ public policy. It was also reiterated by the same court in 1993 in terms of ‘ethics of international business as understood by the majority of States composing the international community’. The approach adopted by the Milan Court of Appeal may also imply a tendency towards this approach where it considers ‘international public policy’ as a ‘body of universal principles shared by nations of similar civilization, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions’.

The trend could also be noticed in the Swiss case law where, at some point in time, the notion of ‘transnational public policy’ was recognized. In a 1994 decision, the Swiss Federal Tribunal referred to a ‘universal conception of public policy, under which an award will be incompatible with public policy if it is contrary to the fundamentally applicable moral or legal principles recognized in all civilized countries’. Also in

International public policy is obviously narrower in scope than domestic public policy. The concept of ‘international public policy’, however, is thought to be different from ‘transnational public policy’ which is supranational, as opposed to the former which is the understanding of each specific state of internationally applicable fundamental moral, social and economic considerations from which the state cannot deviate.


Art. 1504 of the Code (through cross-reference to Art. 1502.5).

Fouchard & Guillard, supra n. 13, ¶ 1648.


Westland, the same tribunal held that the judicial review of arbitral awards in Switzerland should be based on ‘transnational or universal public policy including ‘fundamental principles of law’ which are to be complied with irrespective of the connections between the dispute and a given country’. It is notable, and significant for our discussion, that the Swiss Federal Tribunal has finally, in line with the provisions of Article 190(2)(e) of the Swiss Private International Law Statute, returned to a more traditional approach by holding that ‘an award is considered to be incompatible with public policy if it does not comply with the essential and widely accepted values that, according to the conceptions prevailing in Switzerland, should constitute the foundation of all legal orders’.

Had there been a possibility of delineating the notion of ‘transnational public policy’ and giving it a uniform interpretation in practice, this would have constituted a possible solution to the problem at hand. However, the difficulty is that the notion of ‘public policy’ itself, though called international or transnational, is subject to varying judicial interpretations by national judges and, as it has rightly been pointed out, ‘national judges have a forum and the public policy they must enforce can only reflect the local courts’ understanding of international public policy, whatever their source of inspiration may be’.

Indeed there seems to be no logical justification for courts, other than the enforcement courts, to judicially scrutinize an international award to make sure that it is not contrary to the ‘public policy’ of the seat, bearing in mind that the notion of public policy effectively refers to the understanding of such national courts of ‘public policy’. Even if this notion is meant to refer to the subjective perception of a given national judge of the so-called international public policy, again no persuasive reason justifying the intervention of a national court, other than the enforcement court, on this ground could be evinced. It may, therefore, be suggested that the violation of public policy as a general concept could safely be omitted from the grounds for setting aside an international arbitral award. This omission will, it is submitted, be in line with the international efforts to harmonize the law in this area, without unnecessarily undermining the trust of the international business community in arbitration.

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80 Gaillard, supra n. 36, at 60–61. Prof. Gaillard continues: ‘Even though one may hope that such public policy reflects universal values, it remains that, given its sources, it is necessarily national as its contours are defined by each national court carrying out the review of the award. That is why, when used by a national judge, the term ‘transnational public order’ may be regarded as inapposite, or a simple tribute to the existence of a transnational legal order beyond the judge’s own national legal order.’ Id.
81 Prof. Park refers to ‘public policy’ as ‘a chameleon like concept that risks misapplication when refracted through parochial cultural lenses’. While considering public policy analysis unavoidable for the enforcement courts, he believes that ‘such a malleable notion is unnecessarily dangerous when no enforcement is requested’. See Park, supra n. 3, at 605.
It is true that ‘public policy’, having both substantive and procedural aspects, may cover a wide range of deficiencies in the award not expressly referred to in the Model Law and national legislation. However, the whole point in delineating the scope of judicial review is that such a flexible and vague concept, though it may prove useful in certain cases, is itself, due to its inherent flexibility, a potential source of misuse and misapplication. Any deficiency, which, in principle, should be subject to the judicial control of the national courts of the place of arbitration, could expressly, and in concrete terms, be referred to in the Model Law and national legislations. Most importantly, it seems to be unnecessary for national courts to intervene on the basis of their understanding of fundamental moral, social or economic considerations in their state where the award is not intended to be enforced within the territory of that state.

2.3 Possibility of An Action in Revision

It is beyond doubt that an award procured by fraud, by relying on forged documents, or by concealing documents of decisive influence is substantially flawed and cannot be given recognition as a valid arbitral award. An efficient arbitral regime should provide for a form of redress against such an award, the unfairness of which is such that it could not be tolerated by the arbitration community.

The importance of the matter has been recognized quite well by the Cour de Cassation in France where, despite the removal of the possibility of bringing an action in revision by the 1981 Decree, the Court felt it necessary to provide for a possibility of redress in case of fraud:

[t]he revocation of an award rendered in France in an international arbitration matter must exceptionally be admitted in case of fraud when the arbitral tribunal remains constituted after the award has been rendered (or can be reconstituted again).94

While the Cour de Cassation has provided for the possibility of redress by enabling the arbitrators to reconsider the case, the matter has remained unsolved as to a situation where the arbitral tribunal can no longer be reconvened.95 The Swiss Federal Tribunal, in a similar situation, despite the silence of the Swiss Private International Law Statute, has taken the position that the Federal Tribunal has

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82 Decree of May 12, 1981. Some commentators believe that these issues may be covered by other grounds of judicial review, notably ‘due process or public policy’. See Fouchard & Gaillard, supra n. 13, at 919 n. 171.
84 The question has led to some degree of controversy. For a detailed account, see Fouchard & Gaillard, supra n. 13, ¶ 1599; Jean-Francois Poudret & Sebastien Besson, [Article title] Comp. L. Intl.Arb. 790–91 (2007).
‘jurisdiction to hear an action in revision which, if successful, would lead the Federal Tribunal to remit the case to the arbitrators for a decision on the merits’.

The Model Law, for the obvious reason of restricting the grounds for judicial review, has not considered issues like fraud, forgery or concealment of documents of substantial importance as separate grounds for setting aside an award. A view has been expressed to the effect that these grounds may well be covered by the notion of public policy. It was noted earlier that the notion of public policy is fluid and vague in nature. The potential impact on an arbitral decision of circumstances like fraud, forgery or concealment of vital evidence is such that their legal relevance should not depend on whether a court finds that they are covered by the (flexible) notion of public policy. Further, invoking public policy as a ground for setting aside is subject to a time limit, which may make it impossible to bring an action for annulment when the fraud, forgery or concealed documents are discovered well after the time limit has expired.

The approach adopted by the Swiss Federal Tribunal, as referred to above, seems to be preferable in this respect. It may thus be concluded that the exceptional circumstances of fraud, forgery and concealment of vital evidence should be expressly treated as separate grounds for judicial review in the Model Law and national legislations. It should, however, be noted that, like any other ground for revision stricto sensu, they should be treated as exceptional grounds for judicial redress and should therefore be given restrictive scope in terms of interpretation.

2.3 Arbitrator Bias and Corruption as a Ground for Annulment

Corruption and lack of independence or impartiality on the part of an arbitrator are amongst the serious procedural irregularities which should not be ignored by an efficient system of judicial review. Although it may be covered by other grounds of judicial review, notably lack of due process or violation of public policy, there is a strong case for recommending an express provision for treating these issues as grounds for annulment. The provision of Article 33(1)(g) of the Iranian International Commercial Arbitration Act is notable in this regard.

As a final remark, the importance of ‘judicial attitude’ in different states should not be underestimated in any effort aimed at achieving uniformity. While black letter law may well be harmonized by legislatures taking the initiative of adopting a set of

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86 See Loquin, note following the decision of the Cour de Cassation, May 25, 1992, Fougereolle S.A. v. Procofrance S.A. (cited in Fouchard & Gaillard, supra n. 13, ¶ 1599.).
87 See supra.
88 See Park, supra n. 3, at 605 n. 9.
89 See supra.
harmonized rules, what is highly important is the meaning attached to black letter law in practice.90 The non-harmonious interpretation, let alone misapplication, of a set of unified rules in different states will no doubt be counterproductive and may undermine the efforts aimed at harmonization, which is the key factor for obviating unfavourable practices (such as enforcement of annulled awards) in this field. It has indeed been rightly emphasized that 'whatever the black letter of the law may provide, it is the underlying legal and judicial mindset that is really the key to reform'.91

The solution seems to lie in the sustained and continued training of judges, lawyers and arbitrators to improve their understanding of internationally acceptable norms and standards in the field of international arbitration, on the one hand, and the inclusion of lawyers from different states, notably developing states, in international arbitration, on the other. Both of these factors are important in modifying and improving the perception of ‘local distrust’ in arbitration, which clearly exists in certain countries; and also in reforming judicial attitudes towards understanding and unified application of the internationally acceptable standards as envisaged in the international instruments.

3 JURISDICTION OF NATIONAL COURTS OVER THE ANNULMENT ACTION

In order to achieve an efficient and harmonious regime of arbitration at the international level, in addition to substantive issues relevant to the judicial control of arbitral awards, jurisdictional matters should also be the subject of discussion. The absence of a multilateral convention covering the issue of the jurisdiction, added to the heterogeneous domestic arbitration laws,92 is a source of concern for arbitration lawyers and insecurity and instability for the business community.

Although the Model Law has provided for the exclusive jurisdiction of the courts of the seat over any annulment action, the heterogeneity stems from the fact that some countries have not adopted the Model Law in their national legislation and

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90 To some judges and lawyers, arbitration may seem as ‘an important complement to court litigation, but not a true replacement’. One should not forget the classical judicial attitude towards arbitration, as well reflected in the 1845 observation of Justice Story in *Tobey v County of Bristol et al.*, 23 Fed. Cas. 1313, 1320 (1845): ‘Now we all know, that arbitrators . . . cannot compel the production of documents, and papers and books of account, or insist upon a discovery of facts from the parties under oath. They are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases; and hence it has often been said, that the judgment of arbitrators is but rusticum judicium . . . Indeed, so far as the system of compulsive arbitrations has been tried in America, the experiment has not, as I understand, been such as to make any favorable impression upon the public mind, as to its utility or convenience.’ Such an attitude, despite obvious changes in the universal perception as to international arbitration, can still be observed in certain jurisdictions.

91 Landau, supra n. 67, at 13.

92 See Gharavi, supra n. 24, at 17 et seq.
some others, though adopting or being under the influence of the Model Law, have
followed other regimes with respect to the issue of jurisdiction; this situation leads to
extraterritorial jurisdiction of national courts over the annulment of arbitral awards.
Such regimes normally allow national courts to exercise (or at least do not prevent
them from exercising) jurisdiction over an arbitral proceeding held, or the annulment
of an award rendered, outside their territory. The extraterritorial jurisdiction is, in
some cases, exercised directly by assuming jurisdiction over an action to set aside;
and, in some others, it is disguised in the form of an ‘anti-arbitration injunction’
preventing an arbitral proceeding from going forward, or an ‘anti-enforcement
injunction’ precluding the winner from enforcing the award in other territories.

3.1 Exclusive Jurisdiction of the Courts of the Seat

The Model Law provides for the exclusive jurisdiction of the court of the seat over
an annulment action in Article 1(2), which states that ‘[t]he provisions of this Law
[among which are the provisions relating to the setting aside of an arbitral
award] . . . apply only if the place of arbitration is in the territory of this State’.
The undisputed inference from this provision is that: (i) the national courts of the
seat have jurisdiction over an action for annulment of awards rendered within their
territory; and (ii) those courts are not empowered to assume jurisdiction over
annulment of awards rendered outside their territory.

This solution has been accepted in countries which have either adopted, or were
influenced by the solution proposed by, the Model Law with respect to the scope of
application. These countries include France,93 England,94 Germany95 and
Switzerland.96

The Iranian International Commercial Arbitration Act of 1997,97 modelled on
the UNCITRAL Model Law, is silent with respect to the scope of application of the
Act. Furthermore, Article 35 of the 1997 Act, which deals with the ‘recognition and
enforcement of awards’, provides that ‘except for the instances provided for in
Articles 33 and 34,98 arbitral awards rendered in accordance with the provisions of this law

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93 Art. 1504 of the French New Code of Civil Procedure provides: ‘The arbitral award rendered in
France in matters of international arbitration may be the subject matter of a review to vacate in the cases
provided for under Article 1502.’
94 English Arbitration Act 1996, s. 2(1), which reads: ‘The provisions of this part apply where the seat
of the arbitration is in England and Wales or Northern Ireland.’
95 See German Law on Arbitration, s. 1025.
96 See supra.
97 Swiss Federal Statute on Private International Law, art. 176(1). For similar legislation in other countries,
see Gharavi, supra n. 24, at 13–15.
98 See supra.
99 These two articles deal, respectively, with grounds for setting aside and nullity ab initio of arbitral awards.
See supra.
are final and binding.’ The silence of the 1997 Act with respect to the scope of application, together with the language used in Article 35, might imply that the Iranian courts may exercise jurisdiction with respect to awards rendered outside Iranian territory if the award has been rendered in accordance with Iranian arbitration law. In other words, if the arbitration is conducted in accordance with the Iranian law, then, irrespective of the seat of arbitration, the Iranian courts may find themselves competent to entertain an action for annulment. Although this interpretation has given rise to some degree of academic discussion, courts in practice have rarely been reported to have exercised extraterritorial jurisdiction. Indeed, the Tehran Civil Court, in a recent judgment rendered in 2007, clearly declined to exercise jurisdiction over an action brought for the annulment of a GAFTA arbitral award rendered in London. Observing that, due to the existence of a valid arbitration agreement between the parties, national courts have no jurisdiction to deal with the merits of the case, the court went on to hold that ‘basically an Iranian judge has no power to annul an arbitral award rendered in international arbitration which is held outside Iranian territory. It is true that a request for the recognition and enforcement of such an award may be refused in Iran . . . but the possibility of enforceability of such an award in other territories could not be ruled out’. In another action for setting aside an arbitral award rendered in London based on an arbitration clause contained in a charter party agreement, the Tehran Civil Court, after analysing the validity of the arbitration clause, dismissed the annulment action. An appeal to the Court of Appeal was unsuccessful. The Court of Appeal, in a rather detailed judgment, rejected the arguments raised by the appellant suggesting the non-existence, or alternatively invalidity, of the arbitration clause. However, the court surprisingly went on to hold that that part of the award which ordered the respondent to pay compound interest was contrary to the public policy and good morals in Iran, and thus unenforceable. An exceptional appeal to the

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99 Emphasis added.
100 One instance of such a rare exercise of jurisdiction occurred in Judgment 612/613/614, Sept. 20, 2006, Tehran Civil Court (Chamber 3). In that case, one of the parties brought an action for the annulment of an arbitration award rendered in London, arguing that the arbitration agreement was ineffective. Interestingly, the other party, in its counterclaim, also requested the court to annul the arbitration clause and rule on the substance of the dispute. The Tehran Civil Court, after analysing the validity of the arbitration clause on the basis of Iranian law, concluded that the clause was invalid. On this basis, assuming the ineffectiveness of the arbitration award, the court considered the merits of the case and rendered a judgment on the substance. An appeal, on the merits, to the Tehran Court of Appeal was dismissed (Tehran Court of Appeal (Chamber 15), Judgment 751, Aug. 25, 2007). The distinctive character of the case was, however, the fact that both parties based their claim on the invalidity of the arbitration clause, and it might be assumed that the court, on this basis, assumed jurisdiction to rule on the validity of the arbitration clause and thus the effectiveness of the arbitral award.
104 Tehran Court of Appeal (Chamber 15), Judgment 559, July 19, 2005.
Supreme Court was dismissed on the ground that the decision of the Court of Appeal was not ‘contrary to the express provision of the law’. The problem with the decision of both the Court of First Instance and the Court of Appeal is that, though the action for annulment was dismissed on the ground of the existence of a valid arbitration clause, it appears that the court assumed jurisdiction to analyse the validity of the arbitration agreement. This may imply that Iranian courts have exercised jurisdiction to entertain a case relating to the annulment of an arbitral award rendered outside Iranian territory, while the desirable approach, it might be argued, would be for the court to dismiss the action in the first place for lack of jurisdiction.

In any event, the correct approach is that Iranian courts may assume jurisdiction as to the judicial review of an award rendered in international arbitration only if the seat of the arbitration is located in Iran. The basis for such an approach is the express provisions of Article 33 of the 1997 Act which provides that the annulment could be applied for in the courts referred to in Article 6; and this Article provides for the supervisory jurisdiction of the provincial court of the place where the seat of arbitration is located. It can, therefore, be suggested that Iran is amongst the countries where the exclusivity of jurisdiction of the courts of the seat over any annulment action could be assumed.

The advantages of this solution, that is, the exclusive jurisdiction of the courts of the seat, are numerous, among which one may refer to predictability and avoidance of any conflict of jurisdictions. It is clear that if only the courts of the seat exercise jurisdiction over actions for annulment of arbitral awards, this will provide the required degree of predictability for all the parties concerned, which will, in itself, result in security and stability. Moreover, no conflict of jurisdictions, positive or negative, which is the potential source of conflicting decisions or so-called floating awards, would ever arise.

3.2 Extraterritorial Jurisdiction of National Courts over Annulment Actions

As opposed to a regime which provides for the exclusive jurisdiction of the courts of the seat, there are a number of countries which do not follow the territorial criterion. Instead, they prefer a solution which allows their national courts to exercise jurisdiction over actions relating to the annulment of awards rendered outside their territory when the award is rendered pursuant to the arbitration law.

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105 Supreme Court (Chamber 9), Judgment 9/899, Jan. 5, 2007. It should be noted that an appeal to the Supreme Court, in such cases, is exceptionally allowed in cases of express violation of the law. The Supreme Court, faced with a judgment which had, in effect, dismissed the action for annulment, did not find that the decision was in express violation of the provisions of the law.

106 See Gharavi, supra n. 24, at 15–17.
of that state. This will normally be the case as to contracts where the parties have agreed upon the applicability of procedural law of a state while providing for the arbitration to take place in another territory.\textsuperscript{107} It has been claimed that Brazil is one of the states ‘where courts seem to have jurisdiction over annulment of awards rendered abroad, resulting from arbitrations held under Brazilian law’.\textsuperscript{108}

The problem is more severe in the case of countries where national courts find themselves competent to hear actions for annulment of awards rendered outside their territory if a connecting factor, such as the application of their laws to the arbitration agreement, is present. This is the case with the courts of Pakistan and Bangladesh pursuant to their 1940 laws on arbitration. In \textit{Rupali Polyester Ltd. v. Dr. Nael G. Bani Malik Muhammad Qayyum}, a Pakistani court held:

\begin{quote}
the answer to the question as to whether a particular award is a domestic or foreign award does not depend upon the venue of arbitration but upon the law applicable to it. If the arbitration agreement is governed by law of Pakistan, then notwithstanding the awards have been made abroad, the awards shall be deemed to be domestic awards and shall as such be governed by the domestic law of Pakistan.\textsuperscript{109}
\end{quote}

In the same case, the court proceeded to suggest that even where the contract in question has the closest connection with Pakistan, the jurisdiction of the courts of Pakistan does not stand excluded.\textsuperscript{110}

Although by ratification and implementation of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in Pakistan, through the Pakistan Recognition and Enforcement (Arbitral Agreements and Foreign Arbitral) Awards Ordinance of 2005,\textsuperscript{111} the situation seems to have improved in certain aspects, the lack of a clear definition of, and concrete criteria for, what constitutes a ‘foreign arbitral award’ under Pakistani law is still a source of potential concern. The Ordinance defines ‘foreign arbitral award’ in section 2(d) as follows:

‘foreign arbitral award’ means a foreign arbitral award made in a Contracting State and such other State as may be notified by the Federal Government, in the official Gazette.

This clearly leaves a lacuna in the Ordinance and opens the possibility for a Pakistani court to exercise jurisdiction over actions for setting aside an arbitral

\textsuperscript{107} For example, an arbitration taking place in Paris to settle certain disputes arising out of a contract in which Iranian law has been agreed upon as the applicable procedural law.

\textsuperscript{108} Gharavi, supra n. 24, at 21; This is because the Brazilian Arbitration Act (Law no. 9307, Sept. 23, 1996) does not indicate that its provisions for the annulment of arbitral awards (Arts 32 and 33) are only applicable if the arbitration takes place within Brazilian territory.

\textsuperscript{109} RL D, XLVI 551 (1994) (Lahore, May 3, 1994).

\textsuperscript{110} Id. at 553.

\textsuperscript{111} Ordinance no.VIII of 2005 which was subsequently repromulgated as Presidential Ordinance no.XLII of 2006 and also of Mar. 10, 2007.
award rendered abroad by considering it as ‘domestic’ in the presence of a connecting factor.\textsuperscript{112}

The situation where the courts of a state exercise jurisdiction over the action for the setting aside of an award rendered outside their territory, in addition to being inconsistent with the efforts aimed at harmonizing the law and practice in this area, results in numerous problems.

First, it is a source of unpredictability for the actors in the field of business and commerce, particularly where jurisdiction is claimed in the presence of the slightest connecting factor, even other than the application of the procedural law of the state concerned.

Second, it may lead to a positive conflict of jurisdiction where courts of two different states may, at the same time, find themselves competent to entertain an action for the setting aside of an award. In an international arbitration conducted in France with certain connecting factors to Pakistan, for example, the application of the procedural laws of Pakistan, French courts (as the courts of the seat) and Pakistani courts (as the courts of the place under the law of which the arbitration has been conducted) may, at the request of the losing party, exercise jurisdiction over actions brought for setting aside the award. The concurrent exercise of jurisdiction by the courts of different states on the same matter is itself a source of problems, among which the risk of conflicting judgments\textsuperscript{113} is the most notable. In such a case, the enforcement of an award that was confirmed in one jurisdiction and annulled in another is yet another problem.

Third and most importantly, it opens up the possibility for a state, particularly where the state or a state-owned entity is involved in the arbitration, to obstruct and undermine international arbitration by resorting to its local courts. This may take the initial disguised form of an anti-arbitration injunction issued by the local courts (as was the case in \textit{Hubco},\textsuperscript{114} \textit{COPEL}\textsuperscript{115} and \textit{National Grid}\textsuperscript{116} to prevent the arbitration from going forward; or it may actually be in the form of an action for

\begin{itemize}
  \item \textsuperscript{113} Gharavi, \textit{supra} n. 24, at 29.
  \item \textsuperscript{114} \textit{Hub Power Co. Ltd. v WAPDA & Federation of Pakistan}, PLD 2000 Supreme Court 841. The case involved a contract entered into by Hubco and WAPDA (Water and Power Authority of Pakistan) for the construction and exploitation of an electrical power station in Pakistan worth USD 1.8 billion. Arbitration commenced in London based on an ICC arbitration clause contained in the contract, but WAPDA, alleging that certain agreements had been obtained through bribery and corruption, seized the Pakistani courts of these issues. The Supreme Court of Pakistan, in its ruling of 14 June 2000, refused to enforce the arbitration agreement on the ground that the allegation of corruption rendered the dispute non-arbitrable. Also reported in 16 Arb. Int’l 1431 (2000); 15 Mealey’s Int’l Arb. Rep. (2000). This decision has been widely criticized by the international arbitration community. See, e.g., Louise Barrington, \textit{Hubco v WAPDA: Pakistani Top Court Rejects Modern Arbitration}, 11 Am. Rev. Int’l Arb. 385 (2000); Landau, \textit{supra} n. 67, at 11–12; Gaillard, \textit{supra} n. 36, at 72.

\end{itemize}
setting aside to obstruct the enforcement of an award rendered outside the territories of the state concerned.

The latter scenario actually happened in the Pertamina case\(^\text{117}\) where an arbitral award rendered in Switzerland was annulled by the Central Jakarta District Court on the grounds that it was contrary to the 1958 New York Convention and Indonesian arbitration law. The case concerned two contracts, entered into between Pertamina, an oil, gas and geothermal energy company wholly owned by the Government of Indonesia, and KBC, a Cayman Islands limited liability power development company, for the construction of a power plant in Indonesia. After suspension of the project by the Government of Indonesia as part of a national effort to stabilize the Indonesian economy, KBC, in April 1998, initiated arbitral proceedings in Switzerland, which were to be conducted under the UNCITRAL Arbitration Rules pursuant to arbitration clauses contained in both contracts. Having rejected the objections raised by Pertamina, which included a challenge to the composition of the arbitral tribunal, the arbitral tribunal rendered an award to the effect that Pertamina and another state-owned company (PLN), which was party to the second contract, had breached the contracts, and awarded damages to KBC exceeding USD 260 million. A request to set aside the award was filed with the Supreme Court of

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\(^{117}\) *Companhia Paranaense de Energia (COPEL) v. UEG Aravcaria Ltd.*, 3 Revista Brasileira de Arbitragem (R.B.A.) 170 (2004). In this case, which involved a dispute arising out of a contract entered into by COPEL, a government-controlled company in the Brazilian State of Parana, and UEG, the latter company initiated arbitration proceedings in Paris pursuant to an ICC arbitration clause contained in the contract. COPEL filed a request for a preliminary injunction before a court in the city of Curitiba, requesting the court (i) to declare that the arbitration clause was null and void on the ground that COPEL, as a government-controlled entity, could not arbitrate disputes without express statutory authorization; and (ii) to order the claimant to stay the arbitral proceedings. The court, in its decision of 3 Jun. 2003, issued the requested injunction imposing on the claimant a monetary penalty in case of non-compliance; and annulled the arbitration agreement in a decision of 15 Mar. 2004. Although the Parana Court of Appeal, based on the principle of competence-competence, reversed the injunction and allowed the arbitration to go forward, the President of the Parana Court of Appeal on 15 Jul. 2004, overturned this decision. Notwithstanding this, the arbitral tribunal proceeded with the arbitration and decided, by majority, that it had jurisdiction over the matter.

\(^{116}\) *National Grid Transco (NGT) v. Argentinean Government*, Decision of Jul. 3, 2007 of the Federal Court of Appeal of Argentine. “EN – Procuración del Tesoro v. Cámara de Comercio Internacional.” This was an arbitration initiated by NGT against Argentina on the basis of an arbitration clause contained in the BIT entered into between the United Kingdom and Argentina. The arbitration was held in Washington under the UNCITRAL Arbitration Rules. Argentina unsuccessfully challenged the presiding arbitrator before the ICC International Court of Arbitration as the appointing authority. Having brought an action to set aside the decision of the appointing authority, Argentina on 12 Jun. 2007, requested the Argentinean Federal Court of Appeal on administrative matters to dictate a precautionary measure ordering the arbitral tribunal to suspend the arbitration until the action to set aside was decided. The court, having found that the prerequisites provided for in art. 230 of the Argentinean Civil and Commercial Procedural Code had been met, acceded to the request and, on 3 Jul. 2007, ordered the suspension of the arbitration. Notwithstanding the injunction, the arbitral tribunal proceeded with the arbitration. See the case note by Manuel J. Marriño, http://www.marval.com.ar/Publicaciones/MarvalNoticias/PublicacionMN/tabid/96/language/en-US/Default.aspx?ItemID=1045.

\(^{117}\) *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357 (5th Cir. 2003).
Switzerland, as the court of the seat, and was dismissed in April 2001 on procedural grounds. While KBC was bringing actions under the 1958 New York Convention for the recognition and enforcement of the award in different jurisdictions, including the United States, Hong Kong, Canada and Singapore, Pertamina filed an application, in March 2002, in the Central District Court of Jakarta to annul the award and also sought an injunction and penalties to prevent KBC from seeking to enforce the award. The Indonesian Court, on 27 August 2002, set aside the award on the ground that it was contrary to public policy and issued an injunction against KBC prohibiting it from enforcing the award under the penalty of having to pay a fine of USD 500,000 per day. This decision has been subject to severe criticism by the international arbitration community.118

It is important for the purpose of this survey to point out that the extraterritorial jurisdiction exercised by the Indonesian court is the primary source of all the problematic issues that followed this decision.119 Indeed, even in case of the anti-arbitration injunctions, referred to above,120 though the matter might be approached from different angles, it is, in the first place, the extraterritorial jurisdiction exercised over arbitrations being conducted outside the territory of the state concerned which should be the focal point for discussion.

3.3 Analysis: Is the Enforcement of Annulled Awards the Right Answer?

The validity of an arbitration agreement and, more generally, the legitimacy of an arbitral process, as accepted in modern arbitration laws and pronounced in the

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118 See, e.g., Gaillard, supra n. 36, at 74–76.

119 Only a part of these problems relate to the relevant proceedings in the United States: KBC had already obtained the recognition of the award in December 2001 in the United States. After a request for annulment and an injunction was filed in the Indonesian court, KBC promptly requested the US courts to order Pertamina to refrain from pursuing its request for an injunction. The US Court for the Southern District of Texas granted the request by issuing a temporary restraining order in April 2002. After the injunction was issued by the Indonesian courts, since the measure taken by the US Court was not complied with, KBC requested that Pertamina be held in contempt of court. The district court found Pertamina in contempt of court, again ordered Pertamina to withdraw its Indonesian application for injunctive relief against KBC, and also ordered Pertamina to indemnify KBC for any fines resulting from the Indonesian injunction. An appeal was made to the Court of Appeal for the Fifth Circuit which rendered a decision on 18 Jun. 2003. The court reversed the judgment of the district court mainly on the ground that ‘other enforcement courts can and sometimes do conduct their own independent analysis of substantive challenges to the enforcement of the foreign award’ and the annulment of the award in Indonesia ‘in no way affects the authority of the district court . . . to enforce the Award in the United States’. Thus, the Indonesian decision did not give rise to any inequitable hardship for KBC, and therefore, the Court of Appeal, though empathizing with the district court and sharing its frustrations at the acts of Pertamina and its counsel, reversed the judgment and vacated the preliminary injunction and, as necessary, the contempt order against Pertamina.

120 See supra nn. 114–16.
Model Law, should, in the first place, be determined by the arbitrators. The widely recognized principles of competence-competence and the autonomy of the arbitral proceedings call for the universal recognition of the power and competence of an arbitral tribunal to decide on any issue which may arise during the arbitral proceedings. The judicial interference in this respect, as far as the jurisdiction is concerned, should only be reserved for the courts of the seat of arbitration; and should be strictly limited to functions of judicial assistance to arbitral tribunals and the parties in the course of a reference. The Model Law incorporates this idea by expressly providing that "[i]n matters governed by this Law, no court shall intervene except where so provided in this Law." It has been suggested that judicial interference by national courts, aimed at obstructing and undermining international arbitration, may bring about, at least in certain circumstances and under certain conditions, the possible international responsibility of the state whose courts have prohibited a party from resorting to arbitration as a dispute settlement mechanism to which the parties have consented.

In Iran, the principle of competence-competence as provided for by the International Commercial Arbitration Act of 1997 is generally respected by the courts. National courts, as far as can be gathered from the available sources, refrain from any decision on disputes where a prima facie valid arbitration clause exists.

\[\text{This, of course, does not exclude the possibility of a review, at a later stage, by a competent court of the jurisdictional decision made by an arbitral tribunal on the basis of the doctrine of competence-competence. Such a review may also include an investigation of the facts in order to determine the validity of the arbitration agreement, as well as its binding effect on the parties concerned. Indeed, the English Supreme Court, in a recent judgment rendered on 3 Nov. 2010, citing with approval the US case of China Minmetals Materials Import & Export Co., Ltd. v. Chi Mei Corp., 334 F.3d 274 (2003), noted that 'the concept of competence-competence is ‘applied in slightly different ways around the world,’ but it ‘says nothing about judicial review’ and ‘it appears that every country adhering to the competence-competence principle allows some form of judicial review of the arbitrator’s jurisdictional decision.’"}\]

\[\text{Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46, para. 25, per Lord Mance; also in the same case, Lord Collins, analysing rather extensively the law and practice in this respect, observed (¶ 86): 'Consequently in most national systems, arbitral tribunals are entitled to consider their own jurisdiction, and to do so in the form of an award. But the last word as to whether or not an alleged arbitral tribunal actually has jurisdiction will lie with a court, either in a challenge brought before the courts of the arbitral seat, where the determination may be set aside or annulled, or in a challenge to recognition or enforcement abroad.'}\]
The Supreme Court, in its decision of 2 June 1998, made it clear that, with the existence of a prima facie valid arbitration clause which provides for all disputes to be settled by arbitration under the LCIA Rules, a national court has no jurisdiction to entertain the case. Similarly, the Tehran Civil Court dismissed an action for the declaration of the invalidity of an arbitration clause, which provided for the settlement of disputes under the Swiss Arbitration Rules in the Geneva Chamber of Commerce and Industry, holding that the dispute should be settled by the arbitral tribunal agreed upon by the parties.

After the award is rendered, the recognition of the exclusive jurisdiction of the courts of the seat with respect to any judicial review provides a satisfactory solution to the problems discussed above. It now seems to be beyond doubt that a properly defined degree of court scrutiny at the place of arbitration ‘promotes a more efficient arbitral process by enhancing fidelity of the parties’ shared pre-contract expectations’ and also in certain instances ‘furthers the development of commercial norms to guide business managers in planning future transactions’. The courts of the seat are well-suited to be charged with this task.

To sum up, it is worthy of emphasis that the primary area of concern, as seen above, is centred on the jurisdiction of national courts, other than the courts of the seat, to become involved in a dispute which has been submitted to international arbitration on the basis of a prima facie valid arbitration agreement, be it in the form of disregarding an arbitration agreement, or ordering the stay of arbitral proceedings, or setting aside an arbitral award. To reach the appropriate solution, international efforts to harmonize the law with regard to arbitration, having recognized the principle of competence-competence, should focus on the exclusive jurisdiction of the courts of the seat to provide judicial assistance to the arbitral tribunal and the parties while the arbitration is in process and to review the resulting award, at the request of the losing party, after the process comes to an end.

The latter part of the article should apparently be taken as referring to a situation where the arbitration agreement is manifestly ineffective.

The English Supreme Court in a very recent judgment rejected the idea that in order to resist enforcement on a certain ground, the losing party was required to bring an action for setting aside on the same ground before being successfully able to resist enforcement on the same ground. Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan, [2010] UKSC 46.
It has to be acknowledged that at least one practical reason for advocating the practice of enforcement of annulled arbitral awards in certain jurisdictions, notably France, is the exercise of extraterritorial jurisdiction over actions to set aside by certain countries, which are normally an attempt to undermine international arbitration and mostly resorted to in cases where an unfavourable award is rendered against a state or a state-owned entity. One cannot ignore the jurisprudence developed in recent years to justify this practice by theorizing international arbitration as having an autonomous character and being subject to a distinct, transnational legal order. It should, however, be hoped that the general trend in reforming international arbitration-related legislation in line with the Model Law, coupled with increased international efforts to harmonize the law with respect to international arbitration, will result in further delineating the scope of judicial review and the uniform acceptance of the exclusive jurisdiction of the courts of the seat in annulment actions. This process will hopefully end the unfortunate consequences resulting from the exercise of excessive judicial control and extraterritorial jurisdiction.

Until that end is achieved, it seems that the solution adopted by the US courts as to the question of enforcement of annulled awards, with an annulment, at least in some cases, being made through the exercise of extraterritorial jurisdiction, could provide a satisfactory solution. The enforcement court, faced with a request for recognition and enforcement of an annulled award, could assess the ‘lawfulness’ of

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131 See, e.g., Hilmarton Ltd. v. Ste Omnium de traitement et de valorisation (OTV), Y.B. Com. Arb. 663 (1995). In this case, the Cour de Cassation held, for the first time, that ‘the award rendered in Switzerland is an international award which is not integrated into the legal system of that State, so that it remains in existence even if set aside and its recognition in France is not contrary to international public policy’. Arab Republic of Egypt v. Chromalloy Aero Services, Paris Court of Appeal, Jan. 14, 1997, Y.B. Com. Arb. 691 (1997); La Société S.A. Lesbats et fils v. Monsieur Völler Le Docteur GmbH, Jan. 18, 2007, Y.B. Com. Arb. 297 (2007); P.T. Putrabali Adyamulia v. Rena Holding, Cour de Cassation, Jun. 29, 2007, Y.B. Com. Arb. 299 (2007). The Cour de Cassation, in the latter case (at 301), referred to an international arbitral award as a ‘decision of international justice’ and held that the validity of such a decision should be determined by the courts of the place where the enforcement is sought.

132 The other reason being excessive judicial interference in terms of the scope of judicial review. It has rightly been suggested by at least one scholar that the idea of elimination of judicial review, which is theoretically based on the doctrine of international arbitration being ‘stateless’ and subject to a ‘distinct transnational legal order’, is ‘a response to a correct perception of excessive judicial interference in the arbitral process and, like many counter-reactions, go too far the other way’. Goode, supra n. 7, at 47.

133 For an excellent account on this see Gaillard, supra n. 36.

134 The general trend in the US case law seems to be an evaluation of the judicial decision setting aside the award and considering whether such a decision is against US public policy. Thus, an annulled award may only be recognized and enforced in the United States if the decision to set aside is determined to be contrary to US public policy. For example, in TermaRio, the district court, faced with a request to enforce an award set aside by a Colombian court, held ‘plaintiffs cannot seek to enforce their arbitral award here unless the Colombian courts’ decisions violated U.S. public policy’ (TermaRio S.A.E.S.P et al. v. Electrificadora del Atlanticco S.A.E.S.P et al., Mar. 17, 2006, 421 F.Supp.2d 87 (2006). Cited by Gaillard, supra n. 36, n. 354). For a critical analysis of the US case law, see Gaillard, supra n. 36, at 139–143.
the judicial decision setting aside the award; as long as the judicial decision has been rendered by courts having proper jurisdiction and applying proper and universally accepted standards, that decision should be regarded as determinative of the question at hand; and, in effect, there would be no valid arbitral award to recognize or enforce. If, however, the decision has been rendered by a court with no competence (of course, based on international standards) to entertain the case, or by a competent court that, however, has failed to observe universally accepted standards in rendering its decision, that decision would be regarded as having no effect. Thus, the award, being a valid arbitral award, may be recognized and enforced in the enforcement courts in accordance with the applicable standards. Therefore, the decision of a court exercising extraterritorial jurisdiction in an annulment action could be disregarded by enforcement courts in other jurisdictions for lack of proper jurisdiction based on internationally acceptable standards.

4 CONCLUSION

In order to strike a balance between the two important considerations of finality and fairness, a degree of judicial scrutiny of arbitral awards seems to be necessary. But excessive judicial intervention and exercise of extraterritorial jurisdiction over the arbitral process and actions for annulment of arbitral awards may undermine international arbitration as a private dispute settlement mechanism. The solution, however, does not seem to be the adoption of extreme practices, like the enforcement of annulled awards, which lead to unfavourable consequences and may seem to be contrary to the principle of comity of nations.

Increased international efforts aimed at harmonizing the law and practice with respect to the scope of judicial review and the exclusivity of jurisdiction of the courts of the seat will pave the way for a harmonized regime of international arbitration which will, in turn, obviate any need for ignoring a judicial decision lawfully rendered to set the award aside. Although the UNCITRAL Model Law, having been adopted by more than sixty states and having influenced many others in drafting national legislation, has achieved a considerable degree of success in harmonizing the law and practice of international commercial arbitration, more efforts need to be undertaken to delineate and define the precise scope of judicial review. This is due to the fact that some legislatures have departed, to some extent, from the Model Law with respect to the scope of judicial review. Added to this is the fluidity and vagueness of certain grounds envisaged by the Model Law for setting aside arbitral awards.

The satisfactory solution lies in formulating an efficient and harmonized regime of judicial review which could exclusively be exercised by the competent courts at the seat of arbitration. Such a regime will increase the efficiency and reliability of
international arbitration which will, in turn, lead to the increased trust of all actors, including the international business community, in this unique private mechanism for dispute settlement. To this end, together with encouraging national legislatures to adopt a uniform regime of judicial review, the judicial attitude of national judges should also be refined and improved.