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The main sources of inconvenience in international trade which the parties usually face when determining whether to engage in trade with a certain country are the costs and risks associated with potential dispute resolution, such as procedural rules, costs of the process, confidentiality, appeal process, the enforceability of decision.

Resolving international disputes by litigation can be extremely costly, especially for the business in developing countries. The consultation of the local counsel in the early stages of a dispute would be recommended, and later, where the dispute is to be resolved overseas, engaging local counsel to the court in which the dispute is to be heard.

The general thought of the commercial party would be about the security in national home courts of their counterparty's as well as the proficiency of some foreign courts in international business disputes.

In some jurisdictions, particularly in the developing countries, courts have limited experience with cross-border commercial disputes and judges are usually assigned to matters randomly without considering capability or experience.

Some technical difficulties such as translation, time limits and representation by foreign counsel heighten concerns about local expertise and local procedural rules.

This can lead to potential delays and significant increases in costs for parallel proceedings, appeals of different levels of different national court systems and difficulties in enforcing judgments.

According to the World Bank's Doing Business rankings, it takes about 4 years to enforce a contract in first-instance courts in countries like Trinidad and Tobago, Bangladesh and India, compared to just under the 10 months it takes to do so in Singapore, New Zealand and Rwanda.[1]

[1] A World Bank's Doing Business 2019 Training for Reform (online ed, 16th edition 2019).

The lack of transparency and confidence in the procedures used in international dispute resolution, especially in developing countries, put off businesses there from opening productive cross-border commercial actions.

In the era of globalisation and the extension of trading boundaries, international commercial transactions have considerably increased. Commercial practices and strategies have become progressively complex and transnational, which influenced the increase in the number of disputes and demand for unification of national laws, institutions and policies for ensuring free trade.

Initially, it would be good to understand what concept should be put in the ground of the discussion – unification or harmonisation of law, or both.

The unification and harmonisation of laws are similar in the sense that both involve several legal systems and both are also oriented towards creating some level of amalgamation from a variety.

Nevertheless, unification and harmonisation have different fundamental purposes.

The unification works towards complete unity in details, such as a new law should completely replace the national laws that have existed before and focus on merging two or more legal systems and replacing them with a single system.

The harmonisation works to coordinate different legal systems by removing main differences and focuses on the enactment of legislation which incorporates the consistent fundamental principles into the local law, so national laws of different legal systems become closer and coexist as the harmonic tandem, but not identical.

The two terms are in many ways complementary, although harmonisation generally involves a common understanding of the meaning of certain terms or the substance of certain concepts, while uniformity is generally part of a larger process requiring agreement on rules. Unification of laws had as its original goal the standardisation of legislation by means of uniform model codes or statutes that sovereign states would adopt and consistently apply. However, in recent times, there has been a gradual shift in unification

movement as it moved away from uniformity and become associated with the notion of harmonisation.[2]

The process of harmonisation is often justified on the ground that it creates stability and certainty in international trade by enabling parties to predict in advance the rules that are likely to apply to them. The goal of harmonisation has been pursued with some success in a number of areas of international trade law, including general principles of contract law, international sale of goods, finance, transport and intellectual property and arbitration.[3]

The international commercial arbitration has developed as a significant method for resolving disputes arising in transnational economic transactions. Speed, economy and finality are probably the strongest drivers for contractual parties in the decision to choose the arbitral procedure.

The arbitration has a long history, dating back to medieval Europe and the emergence of a merchant class that engaged in commercial activity across borders. Rather than making use of the court systems in their own countries, which were undeveloped, procedurally backwards and cumbersome, traders preferred to set up their own tribunals, consisting of their own representatives who were familiar with the types of disputes that arose.[4]

There is great scope for flexibility and neutrality, which are attractive features for parties from commercial backgrounds, particularly when they come from different countries and fear being subjected to an unfamiliar and foreign judicial system. Arbitration thus provides an opportunity for bridging the gap between common and civil lawyers.[5]

The high degree of uncertainty and risk associated with litigating international commercial disputes in national courts has also been a contributing factor in the importance of international commercial arbitration as the preferred method of resolving international commercial disputes and as the leading alternative to litigation as a means of settling

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[2] Martin Boodman *The Myth of Harmonisation of Laws* (1991) 39 Am. J. Comp. L.699 at 705

[3] Richard Garnett *International Arbitration Law: Progress Towards Harmonisation* (online ed, Melbourne Journal of International Law Vol 3, 2002).

[4] Richard Garnett, above n 3.

[5] Richard Garnett, above n 3.

international commercial and business disputes in a neutral environment as a private, binding and enforceable dispute resolution option.

A contributing factor is the continuing emancipation of the arbitral process from the sway of national laws and its gradual subordination to transnational standards. The loosening of national control over arbitration parallels similar developments in other spheres of private law that are essential to the proper functioning of world markets, such as the law of contract. From a historical perspective, this evolutionary process helps remove those impediments to reinstating universal legal standards that were created by the excessive nationalism which perverted universal law in the nineteenth century.[6]

The tribunals themselves were also multinational and existed independently of any national legal system. They applied a type of uniform commercial law that was based on the understandings and practices of the traders themselves rather than any particular domestic law.

There has been a growing movement to free international arbitration from the control of national laws and courts brought about by the pressure associated with globalisation, increased levels of international trade and attempts at establishing a harmonized unified legal framework through a form of transnational order.[7]

Various methods (both mandatory and non-mandatory) have been used to effect legal harmonisation, including the enactment of formal international conventions concluded by states and the subsequent implementation of such conventions into national law.[8]

The first attempt at harmonisation of the arbitration law was made through the adoption of the 1958 New York Convention by various national states.

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[6] Vratislav Pechota *The Future of the Law Governing the International Arbitral Process: Unification and Beyond* (Vol. 3 No. 1-4, December 1992) at 19-20.

[7] Vratislav Pechota, above n 6 at 19-20.

[8] David W Leebron *Lying Down with the Procrustes: An Analysis of Harmonisation Claims in Fair Trade and Harmonisation: Pre Requisite for Free Trade?* (1996) at 81.

By the 1980s there was a clear distinction between the small number of arbitration friendly states with appropriate international arbitration laws and developed case law and many other states which had not updated their international arbitral management.

As of August 2020, the New York Convention has been ratified by 165 States[9], including New Zealand and its biggest trading partners. The Convention means that an arbitration award made in one of the signatory states can be enforced in any of the other signatory states, so arbitration awards are relatively easy to enforce.

Furthermore, the UNCITRAL commenced work on harmonising national arbitration laws using the New York Convention as the basis. UNCITRAL has adopted many methods to further harmonisation of the law of international trade law, including international conventions model treaty provisions, model laws, uniform rules for the use of parties to private transactions, legal guides and recommendations.

There are many examples of harmonised laws in international trade such as the Incoterms Rules 2020, The Uniform Customs and Practice for Documentary Credits (UPC 600) 2007 and the UNIDROIT Principles of International Commercial Contracts 2016.

The harmonisation strategy implemented by UNCITRAL refers to the international unification of law to reduce the differences between national legal systems by inducing them to adopt fundamental principles of law.

Harmonisation and uniformity played a particularly important role in efforts to internationalise arbitration law.

Entering into international commercial relations the parties firstly face with the question of the method of enforcing their rights according to an international agreement. When a dispute involves multiple parties from multiple countries, it becomes a question as to how and where to handle the dispute.

[9] The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards (online ed, Contracting States, 10 June 1958, New York).

These are a few of the challenging consequences that businesses might be facing when they have not agreed on a way to resolve disputes or when they do, the agreed dispute resolution clause is invalid or wide open to interpretation. The international litigation system, which is currently applicable by default is all too often even more time-consuming, expensive and inefficient.

The key aspect of arbitration has always been that it is based on an agreement between parties, so they have a substantial freedom over issues such as the place of arbitration, the applicable law, the language of the arbitration, the composition of the bench, and the confidentiality of proceedings. The centrality of the party's agreement to arbitration has also been an important factor in encouraging uniformity in international arbitration law.

Arbitration must have been agreed to by the parties in the relevant contract. The agreement should also provide which arbitration rules are to apply and when and where the arbitration should take place to avoid a dispute over the arbitration procedure.

When the place of the arbitration is specified in the arbitration clause, presumably, the procedural law of that place applies to the arbitration.

It is quite often that the contract commercial parties either fail to include provisions of arbitration dispute resolution into the contract between them or include unworkable mechanisms for dispute resolution based on outdated legislation, or even get involved in trade transactions without formal documentation.

The arbitral tribunal will apply the procedural law of the seat in the arbitration from the point of the future review and enforcement of the arbitral award, considering Art V (1)(d) of New York Convention the recognition and enforcement of the award, may be refused if the arbitral procedure was not following with the agreement of the parties or was not under the law of the country where the arbitration took place.[10]

[10] New York Convention 1958, art V (1) (d).

It is important to separate the procedural law of arbitration from the law governing the arbitration agreement and undelaying contact itself.

The issue that can arise in relation to substantive law is whether parties may choose an international commercial law to resolve the substance of their dispute. Determination of this question not only has implications for party autonomy, but also for the unification of laws.

The relevance to harmonisation is demonstrated by the fact that if a substantive, international commercial law were recognised and universally accepted, conflicts between national laws would disappear and all arbitral tribunals would apply the same law.

There is a complex and dynamic relationship between the drive of the arbitrating parties and the national legal systems within the international arbitral regime.

Although an international commercial arbitration starts with a private agreement between the parties and continues by way of private proceedings, it ends with an arbitral award that is binding on the parties and which most national courts will recognize and enforce, if necessary. Thus, national states and their legal systems play an important role in the international arbitral system.

The process of harmonisation acknowledges the role of national laws and courts in the international arbitration process, the New York Convention has taken a similarity approach in the role of courts after the conclusion of the arbitral process with respect to the arbitral award and harmonised the grounds for setting aside and refusal of recognition and enforcement of arbitral awards.[11]

The treatment of the public policy exception is a good example, where the distinction between international and domestic public policy has been drawn, with only breaches in the first category applying to enforcement proceedings under the New York Convention. The idea here is that although an arbitration panel’s decision may be inconsistent with the

[11] New York Convention 1958, art V.

law and practice of the forum country, it is only where the award violates internationally accepted standards of justice that enforcement will be refused.[12]

The New York Convention restructures the process, creating an internationally recognised base standard. The Convention deals with agreements and awards. However, where enforcement is possible, it is often slow, enabling some counterparties to avoid their obligations and whether many countries will comply with it any time soon is a question.

It was recognised soon after the enactment of the New York Convention that, to maintain the momentum toward a unification of international arbitration law, the issue of harmonising and standardising arbitral procedural law would also have to be addressed.

The main principals of arbitration help in the development of internationalisation of arbitration law, like the party's selection of the arbitral seat affects the party's autonomy to choose their own arbitral procedures. The arbitration is a consensual means of resolving disputes, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.[13]

However, another point should be made regarding the issue of harmonisation in the context of international arbitration. It has so far been assumed that the pursuit of harmonisation is an absolute objective as far as arbitration law is concerned. While harmonisation does carry with it the benefits of increased simplicity and certainty in a traditionally disparate private international legal context, it may not be completely achievable given the overriding goal of party autonomy. If it is accepted that the heart of arbitration is the parties' agreement, then ultimately it should be a matter for each set of individual parties as to what law they choose to govern their procedure. If different sets of parties choose different laws then this diversity should be welcomed in principle. However, for the reasons mentioned above, such individual choices are unlikely to produce widely differing outcomes in terms of the law actually applied, given the increasingly similar content of most national arbitral

[12] Richard Garnett, above n 3.

[13] UNCITRAL Model Law 1985, art 19.

procedural laws and the growing role of institutional arbitration. In a sense then, party autonomy will rarely conflict with harmonisation as a principle in the arbitration context.[14]

Further evidence of a tendency towards harmonisation in an arbitral procedure can be seen in the growth of institutions engaged in the administration and supervision of international arbitrations, such as, the International Chamber of Commerce (ICC) Rules, the World Intellectual Property Organization (WIPO) Arbitration Rules, the London Court of International Arbitration (LCIA) Rules, etc.

In the context of international arbitration, it is unusual for parties to have the ability to appeal an arbitration award.

The question of appeal whether law or fact was not initially detailed in international arbitration legislation and even when the UNCITRAL Model Law on International Commercial Arbitration was released in 1985.

Some arbitration rules expressly exclude the right to appeal the tribunal's award, such as, the International Chamber of Commerce (ICC) Rules, the World Intellectual Property Organization (WIPO) Arbitration Rules, the London Court of International Arbitration (LCIA) Rules, etc.

The ICC Rules are the most widely-used institutional arbitral rules in the world. Awards made under the ICC Rules are "binding" on the parties. The relevant provision states that parties must "carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made".[15]

The WIPO Arbitration rules provision states that parties by agreeing to arbitration under these Rules undertake to carry out the award without delay, and waive their right to any form of appeal or recourse to a court of law or other judicial authority, insofar as such waiver may validly be made under the applicable law.[16]

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[14] Richard Garnett, above n 3.

[15] International Chamber of Commerce (ICC) Rules 2017, art 34 (6).

[16] WIPO Arbitration Rules 2020, art 66.

The limitation on award remedies under these Rules to only the corrections that can be made as one of the main reasons that parties seek to have disputes resolved via international arbitration rather than national courts is the final and binding nature of arbitral awards.

However, some arbitration rules leave it open, notably those rules associated with soft commodity trade associations, such as the American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR) adopted Optional Appellate Arbitration Rules in 2013.[17], the Grain and Feed Trade Association (GAFTA), also have long-established appeal mechanisms such as the GAFTA Boards of Appeal..[18]

There are countries which adopted appeal on a question of law under their legislation, such as New Zealand, United Kingdom, Hong Kong, Singapore, Malaysia, Australia, United States, Egypt and some others.

A good place to start may be the fact that New Zealand is in a minority in having a presumptive appeals jurisdiction. A right to review akin to Arts 34 and 36 of the UNCITRAL model is virtually universal but not so provision for appeals. The majority and the Model Law itself, get by perfectly well without it..[19]

New Zealand Arbitration Act 1996 in clause 5(1) of Schedule 2 provides for appeals on specific questions of law arising out of an award and where the parties have agreed to appeals either before or after the making of the award or with the leave of the High Court.

This clause allows the parties to exclude the appeals to the High Court and to agree to the appeals being heard by the Arbitrators and Mediators Institute of New Zealand (AMINZ) appointed Arbitration Appeals Tribunal (AAT).

Practically, this option will be well workable for domestic arbitration through the given provision, but for international arbitrations would not expect the parties to opt in for

[17] Optional Appellate Arbitration Rules 2013.

[18] GAFTA Arbitration Rules No.125 2018, ss 10-15.

[19] Robert Fisher QC *Appeals on Questions of Law* (First Annual New Zealand Arbitration Day, Auckland, 9 June 2006) s 45.

appeals, or specify in their contract the need for leave to be granted by the court before appeals can proceed.

The purpose of the AMINZ Arbitration Appeal Rules is to encourage, through the use of the AMINZ Arbitration Appeal Panel, the efficient, confidential and high-quality resolution of appeals from arbitral awards on questions of law.[20]

AMINZ has stressed that the proposal [to introduce the Appeal Rules] is not designed to encourage appeals against arbitral awards but has noted that it is a fact of life that a significant number of parties already elect to appeal on questions of law to the High Court. The proposal is designed to provide an alternative appeal route that will avoid the disadvantages of Court appeals, including loss of confidentiality, delay, and inability to select the appeals tribunal.[21]

These provisions provide an alternative to appeals to the courts and the AAT shall have all the powers of the High Court when the Court is dealing with appeals from arbitral awards under Clause 5 of the Second Schedule to the Act.[22]

Similar to the equivalent powers of the High Court, the New Zealand Dispute Resolution Centre's (NZDRC) Standard Arbitration Rules[23] permit only appeals on questions of law.

The questions of law which are for the judge fall into two categories: first, there are questions which cannot be correctly answered except by someone who is skilled in the law; secondly, there are questions of fact which lawyers have decided that judges can answer better than juries/tribunal.[24]

It should be noted that the category of questions of law could also include fact-specific analyses, for example, the acceptability of evidence.

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[20] AMINZ Arbitration Appeal Rules 2009, r 1.1.

[21] David AR Williams QC *Arbitration and Dispute Resolution* (2006 NZ Law Rev 303) at 330.

[22] AMINZ Arbitration Appeal Rules 2009, r 12.1.

[23] NZDRC Standard Arbitration Rules 2019, s 35.1.

[24] *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44, [2003] 1 WLR 1929 at [26].

The view that mixed fact and law can be considered together in appeal proceedings raises the issue of whether or not the facts support the legal conclusions of the arbitral tribunal.

In *Carr v Gallaway Cook Allan* the Supreme Court has recently confirmed that there is no jurisdiction under the Act – even with the express agreement of the parties – for the High Court to consider appeals on questions of fact. Any such agreements are void and (as in that case) may render the arbitral process and awards void and unenforceable.[25]

However, the difficulty of drawing a workable distinction is nothing new. As the High Court of Australia has commented that the distinction between questions of fact and questions of law is a vital distinction in many fields of law. Notwithstanding attempts by many distinguished judges and jurists to formulate tests for finding the line between the two questions, no satisfactory test of universal application has yet been formulated.[26]

This doubt can be resolved by clause 5 (10) (b) of the Arbitration Act 1996 and the first should be an acceptance of the findings of fact by the arbitral tribunal as being fact and hence final. The focus should be on the law applied to those final facts, rather than whether or not the facts support the findings of law. The only issue for consideration should be whether there has been an error of law.

The scope of Section 69 of the UK Arbitration Act 1996[27] supports this route and the appeal proceeding can be used only to appeal questions in law, not to challenge findings of fact. This is best evidenced by the new restrictions on the right to appeal on a question of law from an arbitration award. Under section 69(2) of the UK Arbitration Act 1996, an appeal may only be brought with the agreement of all the other parties to the proceedings; or with the leave of the court. Under section 69(3), it is intended that leave should only be granted in special cases.

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[25] Kim Francis *Recent developments in arbitral appeals: What can be appealed, and who should determine it?* (Paper for AMINZ conference, March 2016) s 2.1.

[26] At sec 2.7.

[27] Arbitration Act 1996 (UK) s 69.

The line between questions of fact and questions in law could be drawn in relation to the allocating of responsibilities between different decision makers and its purposes. Such as, in jury trials, questions of fact are for the jury and questions of law for the Judge. The arbitrator should be treated as the "master of the facts".[28]

Thinking about the pros and cons of this approach the question arises of comparing the arbitral appeals procedure and appeals under the court rules.

A more restricted and disciplined approach to the scope of appeals under the court rules giving appropriate recognition to the principles of party autonomy and award finality with relevant fee structure and time proceeding could be a possible solution in favour of appeal under court rules.

Firstly, the tension between party confidentiality and precedent value is of course a common issue in relation to appeals against arbitral awards both in New Zealand and abroad.

Protection of commercially sensitive information is undeniably one of the drivers of arbitration as a dispute resolution choice.

The AMINZ Rules[29], NZDRC Rules[30], WIPO Arbitration Rules[31] and others, all have provisions on confidentiality. NZDRC Rules say that the "fact of the arbitration" is also confidential information. Breach of confidentiality is actionable through breach of contract.

The question of confidentiality plays an important role in matter related to an intellectual property and particularly, disclosure of trade secrets. The absence of special measures of protection in the proceedings would be likely to cause serious harm to the party invoking its confidentiality.

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[28] Law Commission *Improving the Arbitration Act 1996* (NZLC R83 (February 2003)) at [120].

[29] AMINZ Arbitration Appeal Rules 2009, r 18.

[30] NZDRC Standard Arbitration Rules 2019, r 38.

[31] WIPO Arbitration Rules 2020, arts 75- 78.

One of the key reason for court appeal that the case will provide a useful precedent of the court decision for the learning of the wider community. The specificity of the dispute solved by the tribunal meant that any decision on the substance of the appeal would have had limited precedential value due to confidentiality. The argument against appeals under the court rules is the loss of confidentiality likely to result.

Confidentiality is difficult to maintain if an award is challenged in the court and it is quite complicated to find a balance between these two privileges, if not possible.

You should either exclude the right to appeal or otherwise apply for court proceedings to be private, which is unlikely to succeed. The judicial approach to confidentiality on appeal in court following arbitration has generally been negative due to the precedent value and the overall intention apparently an irrefutable presumption against confidentiality.

However, it's worth mentioning about UNILEX[32], a data base collecting case law, arbitral awards and bibliography on the UNIDROIT Principles of International Commercial Contracts and on the United Nations Convention on Contracts for the International Sale of Goods (CISG), which contains detailed abstracts of the most important cases decided under both instruments by courts and arbitral tribunals worldwide; the full text of each decision in its original language (when available).

There are several significant decisions that can be used to determine the specific scope of general clauses and contribute to the harmonisation of general contract law, as well as the arbitration process.

The second argument could be looked at against appeals under the court rules is the delay, cost, loss of control over the process, loss of choice in the identity of the decision-makers and uncertainty they cause.

There are several unfortunate examples that risk rendering arbitration "a prelude, rather than an alternative, to litigation" can be provided:[33]

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[32] Unilex <http://www.unilex.info/main/about>.

[33] David AR Williams QC *Arbitration and Dispute Resolution* (2005 NZ Law Rev 119) at 132

(a) *Kiwi Homes v Lassen*[34], where the application for leave to appeal was not determined until two years after the final arbitral award.

(b) *Weatherhead v Deka NZ*[35], where two years elapsed between the date of the award and its determination by the Court of Appeal.

(c) *General Distributors v Casata*, where an application for leave to appeal was filed in mid-2003, and not determined by the Supreme Court until March 2006.

(d) *Carr v Gallaway Cook Allan*[36], the parties submitted the dispute to arbitration in September 2010 leading to a partial award in May 2011. An application filed in August 2011 was ultimately determined by the Supreme Court almost three years later in June 2014.

The delays illustrate the dangers inherent in appeals to the High Court, with the multiple hearings and further appeals potentially involved.

More restricted and disciplined approach to the scope of appeals under the court rules giving appropriate recognition to the principles of party autonomy and award finality with relevant fee structure and time proceeding could be a possible solution in favour of appeal under court rules.

Commercial parties are likely to place a high value upon these considerations. A decision which is prompt and certain allows the parties to manage their time and resources into core commercial activity going forward rather than further litigation.

It is indisputable that appeal right increases the cost of business by requiring the parties to review awards or decision to consider an appeal and to chase the appeal, but it nevertheless retains the parties right to rebut a decision they disagree, even without generating any corresponding timing and financial benefits.

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[34] *Kiwi Homes Ltd v Lassen* [2000] HC Auckland M829/98.

[35] *Weatherhead v Deka NZ Ltd* [2000] 1 NZLR 23 (CA).

[36] *Carr v Gallaway Cook Allan* [2014] NZSC 75, [2014] 1 NZLR 792.

The next argument which could be mentioned in favour of appeal under arbitration rules is connected with the right of the parties to choose the decision-makers and lack of it when they appeal under the court rules.

This would align with the concepts of party autonomy that the arbitrator was specifically chosen by the parties to solve the dispute for a certain area of expertise. Certainly, if the chosen arbitrator is a lawyer, the parties must be assumed to have had a good reason for relying on that lawyer's expertise (not always) and not appeal on a question of law. However, if the arbitrator was not legally qualified and when the question of law arose, having the opportunity to appeal following the same proceeding style and remain the privilege to choose the decision-maker again, talking in a favor of appeal under the arbitration rules.

The fact that an arbitrator may be an eminent lawyer does not lessen the court's duty to give proper consideration to the question whether leave to appeal should be granted since the difference between arbitrator and judge is not one of competence or experience, but of function. [37]

The recommendation of Justice Sir Robert Chambers QC, when he commented at the AMINZ Annual Conference in 2012 in Wellington that "if the parties have chosen to go to arbitration, stay in arbitration. Don't put a foot in each camp, reserving the right to have another go in court". [38]

The appeal mechanisms available for arbitration show that these processes in arbitration are not only preferable to seeking judicial remedies, but they are desired by parties as an efficient and cost-effective means for ensuring reasoned awards.

[37] Robert Fisher QC *Appeals on Questions of Law* (First Annual New Zealand Arbitration Day, Auckland, 9 June 2006) sec 31.

[38] John G Watson *Appeal on Questions of Law – a New Zealand Perspective* (online ed, Bankside Chambers, 2018)

Unification of international arbitration law cannot be achieved by a stroke of the pen and the ground must be very carefully surveyed, and the interests concerned must be won over before any action is undertaken.

The main justifications for harmonisation of national arbitral regimes and practices generally include: providing a jurisdictional interface to enable parties from different systems to interact or communicate, fairness in international transactions and international trade competition, economies of scale, and political economies of scale.[39]

Dispute resolution in international commercial transactions can often be highly uncertain and unpredictable and businesses are reluctant to engage in cross-border trade where the outcome of future disputes and proceedings is such. These risks are particularly considerable in transactions involving parties with limited international experience and limited internal legal resources.

The main purpose is to understand how the global harmonisation of law takes place in our society. The good example here is how commonwealth countries face in getting into international commercial arbitration.

The Commonwealth is a voluntary association of 54 independent and equal sovereign states in Africa, Asia, the Americas, Europe and the Pacific. Commonwealth countries are diverse – they are amongst the world's biggest, smallest, richest and poorest countries. The purpose of the voluntary Commonwealth is for international cooperation and to advance economics, trade, social development, and human rights in member countries.[40]

Having no legal obligations to each other, the commonwealth members are connected through their historical connections, the principals of law, use of the same language, democracy values and policy. However, they have the same problem in international trade between each other as the risks associated with dispute resolution.

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[39] Katherine Lynch *The Forces Of Economic Globalization: Challenges To The Regime Of International Commercial Arbitration* (Kluwer Law International, 2003) at 200.

[40] The Commonwealth < http://www.thecommonwealth.org/about-us>.

The commonwealth countries can be classified into three main categories in relation to arbitration practice and legislation development:

(a) States with well-developed arbitration practice, such as Australia, Canada, New Zealand, Singapore, United Kingdom, where arbitration legislation based on the New York Convention and UNCITRAL Model law with strong arbitral institutional capacity.
(b) States with relatively up-to-dated arbitral legislation based on New York Convention and the UNCITRAL Model Law, such as Bahamas, Bangladesh, Barbados, Brunei, Cyprus, Fiji, Ghana, India, Jamaica, Kenya, Malaysia, Malta, Mozambique, Rwanda, Sri Lanka, Uganda, and Zambia, but arbitration practice is not as developed as in the first category.
(c) States with no arbitral legislation or outdated arbitral legislation, such Belize, Gambia, Grenada, Namibia, Nauru, Saint Lucia, Samoa, Sierra Leone, Solomon Islands, St Kitts and Nevis, Tanzania, Tuvalu, Vanuatu. These members are also non-signatories to the New York Convention.

Such a separation causes certain difficulties and challenges with the equivalent access to international arbitration by commonwealth countries, particularly for the second and third categories of developing countries, which forms a kind of roadblock for trading activities between those countries and influencing their rights to contract and to form relationships with other members of the nation.

The study found that Commonwealth countries are at risk of losing foreign investment and trade from not having modern dispute resolution systems available to their business communities. Furthermore, one of the barriers to cross-border trade for small to medium sized businesses (SMEs) is uncertainty over dispute resolution, so an effective system, such as a best practice modern international commercial arbitration framework is seen as essential to encouraging SMEs to do business in other countries. The Study identifies challenges hindering the use of international commercial arbitration as a dispute resolution mechanism in the Commonwealth, including that more than half of Commonwealth countries do not have a structure that reflects modern best practice, with a small number

not having a legislative framework for arbitration at all; costs; the lack of awareness of international commercial arbitration; the unmet needs of SMEs; and a lack of diversity of the international arbitration community.[41]

There are a few challenges that can be highlighted which developing commonwealth countries face in accessing international arbitration.

Firstly, one of the characteristics of international arbitration is the right of the parties to choose the decision-makers.

The Commonwealth is an association of sufficiently wide and diverse countries representing almost all places of the world and cultural varieties.

It is important to keep in mind that every culture has unique issues that may affect the arbitration process. For example, it is important to think about how witnesses from particular countries may come across to the arbitrators. In certain parts of India, for example, witnesses will shake their head to the side, which may mean either "yes" or "no." It becomes important to make sure that what the parties actually mean is communicated and interpreted correctly. Similarly, respect for the hierarchy is very important in certain countries, and there may be prohibitions against challenging someone who is senior in age or position, which could appear to be violated by aggressive cross-examination as an example. A lack of diverse "quality" arbitrators is problematic…Most importantly, a tribunal that does not reflect the geographical and cultural make-up of the parties is arguably in danger of being less likely and able to give due weight to those geographical or cultural factors that might have informed the parties' dealings.[42]

The party-appointed arbitrators play an important role in ensuring that the tribunal considers the evidence and arguments presented by the parties that appointed them. Apart from ensuring that the award accurately takes into consideration the views of the parties,

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[41] Petra Butler "International Commercial Arbitration Put to the Test in the Commonwealth" (11 September 2020) Social Science Research Network <www.ssrn.com>

[42] Petra Butler "The Commonwealth International Commercial Arbitration" (December 2019) ICC Institute Newsletter issue 13 < https://www.josemigueljudice-arbitration.com/xms/files/04_NOTICIAS/The_ICC_Newsletter_no_13_-December_19-.pdf> at 9-10.

this enhances the likelihood that the losing party will accept the award and comply with it.[43]

I agree with the position that the challenges regarding diversity in international commercial arbitration should be underscored by commonwealth jurisdictions on a way to reduce financial barriers, unconscious bias, social class inequality, and give more flexibility to cultural exclusivity and confidence. The assumption of party's equivalence in the proceeding should not be forgotten.

There was a quite interesting approach on that line taken by the World Intellectual Property Organization (WIPO) under its Arbitration Rules in relation to the nationality of arbitrator and respecting the parties concerning the nationality of the arbitrators and if the parties have not agreed on the nationality of the sole or presiding arbitrator, such arbitrator shall, in the absence of special circumstances such as the need to appoint a person having particular qualifications, be a national of a country other than the countries of the parties.[44]

The second important challenge is the challenge to improve cost efficiency within international commercial arbitration in commonwealth territories.

Access to international commercial arbitration for indigent parties should be ensured through repealing the doctrines of champerty and maintenance for international commercial arbitration at a minimum to allow third-party funding; allowing contingency fee agreements; encouraging before the event legal cost insurance; and, by making legal aid available for international commercial arbitration and including businesses in the eligible group of legal recipients.[45]

This issue creates the ground for the next challenge – a problem in equal technical digitisation within the Commonwealth, having access to the latest technology and the capacity to use such technology particularly in developing commonwealth countries.

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[43] Michelle Grando *Challenges to the Legitimacy of International Arbitration: A Report from the 29th Annual ITA Workshop* (White & Case LLP, 19 September 2017).

[44] WIPO Arbitration Rules 2020, art 20.

[45] Petra Butler, above n 41, at 15.

On a way of harmonization, it would be good to identify ways to connect the benefits of technology with providing more effective dispute resolution systems in arbitration with data analytics driven by a system potentially touching every stage of the arbitral process, including even arbitrator selection.

Online dispute resolution by adopting the latest technology, using video conferencing for meetings instead of physically being at the meeting could be facilitated to promote time and cost efficient cross border disputes. This is particularly relevant for developing countries, especially when something happen as worldwide coronavirus situation.

In addition to the above, the significance of education in the area of international arbitration should be also underlined by the commonwealth community.

Further suggestion of tendency towards harmonisation in support to equal accessing international commercial arbitration, including development countries, in addition to the growth of institutions engaged in the administration and supervision of international arbitrations, could be the proposal of the Bilateral Arbitration Treaty (BAT) regime by Gary Born.[46]

There are relatively few international treaties providing for the effective recognition and enforcement of national court judgments, and domestic law usually provides inadequate and uncertain grounds for enforcing foreign judgments. The Hague Convention 2019 marks the close of decades of work on the subject of foreign enforcement.[47]

Bilateral Arbitration Treaty (BAT) is a treaty that would operate between two states, like New Zealand and Fiji, and replace international litigation as the default dispute resolution regime currently between the treaty parties to an arbitration process.

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[46] Gary Born "Bilateral Arbitration Treaty Regime" (17 May 2015) <www.youtube.com/watch?v=qXIYlExG_D0>).

[47] Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters of 2 July 2019.

Would the BAT regime improve the situation of international arbitration in developing countries towards harmonised unification?

The main purpose of BAT is to reduce barriers to international trade and investment associated with costs and the risks of possible dispute resolution between the treaty parties and provides neutrality, confidentiality and enforceability.[48]

The BAT as a uniform default dispute resolution mechanism will help to:

(a) reduce or avoid the costs associated with parties negotiating through dispute resolution mechanisms;
(b) provide an efficient, expert and enforceable means of dispute resolution;
(c) preserve the parties autonomy to contract out of the default dispute resolution mechanism;
(d) provide the parties equal rights;
(e) design the procedure which would be perfect for particular disputes;
(f) improve tax regime and visa restrictions applicable to arbitrations and foreign counsel that participate in international commercial arbitrations;
(g) default dispute resolution procedure that is neutral and independent from any national legal system.

One of the most valuable characteristics of international arbitration is avoiding specific national courts which would be satisfied by the proposed BAT regime. It could be seen as a boilerplate language solution for the contracting parties.

This practice could be very supportive in terms of international arbitration clauses and help parties and arbitrators.

The default to the arbitration dispute resolution mechanism proposed by the BAT regime will apply where businesses, which are incorporated in each of the States that are parties to

[48] Petra Butler "Draft Commentary on Bilateral Arbitration Treaty" <https://www.wgtn.ac.nz/law/about/publications-and-resources/events-and-podcasts/Explanatory-Note-Draft-Model-Bilateral-Arbitration-Treaty.pdf >

the Treaty have not agreed to an alternative form of dispute resolution or otherwise contracted out of the Treaty.

This default mechanism would require businesses to resolve their international commercial dispute by international arbitration and by specified procedural rules. It would produce an arbitral award that would be subject to recognition in the states party to the Treaty, and likely elsewhere, under provisions incorporated from the New York Convention, thereby encouraging equivalent trade between all countries.

This mechanism would be a great starting point for the resolution of international commercial disputes taken as a fundamental principle in developing the process to accessing international arbitration by the developing countries.

However, there are also some complications in relation to the BAT regime as the possible solution.

Importantly, it would be good to understand if this mechanist is inconsistent with party autonomy, which is a basic principle of international arbitration and could make a serious concern.

The answer to this question is more no, then yes. Undeniably the commercial parties could agree on any other dispute resolution options and are even free to exclude terms of the BAT from the contract. BAT untouched the parties' autonomy and lets the party keep their contractual freedom guaranteed by the Vienna Convention on the Law of Treaties 1969.[49]

The next question is a question of the neutrality of an arbitral seat in relation to the parties and would it be a straightforward process to identify such a place and may it be of no such concern if the arbitration tribunal has an authority to allocate the seat and applicable law, this is a question to contemplate.

[49] The Vienna Convention on the Law of Treaties 1969.

The question of precedent law development should be measured in relation to this default arbitration mechanism, such as when disputes are resolved outside the court system, the court will not be involved in developing the law.

The BAT mechanism suggested by Gary Born was drafted to consider a bilateral relationship between two states. However, it would be worth considering either a multilateral relationship solution between more than two members and drafted as a standalone agreement of the Multilateral Arbitration Treaty (MAT) proposed provisions for a default arbitration mechanism or it can be tailored to a special trade agreement between members.

The MAT's regime with its default arbitration mechanism would utilize the UNCITRAL Arbitration Rules and the awards made would be subject to recognition in the contracting states according to the terms of the New York Convention for all members and allow enhancement of international commercial arbitration within its own unique arbitration ecosystem, modern and effective.

The use of international commercial arbitration as the preferred cross-border dispute resolution mechanism by multinationals has led to the establishment of a particular type of contained ecosystem which can be described as professional arbitration with its own rules. This ecosystem is hallmarked, inter alia, by specialised international arbitration groups in large, globally operating law firms or highly specialised boutiques, professional arbitrators, and arbitral institutions.[50]

Adopting the relevant modem legislation in international arbitration assures potential foreign investors that the national courts will recognise and enforce an agreement to resolve disputes through arbitration, which can be an important consideration with assessing whether to invest, particularly for the developing countries.

[50] Petra Butler, above n 41, at 6.

Despite the many problems that remain to be solved, the process that turns international commercial arbitration into an international modal of operation is irreversible.

The success of international arbitration lies on the ground that it is a communication of individual rights, such as the right to contract and the right to form relationships with others that are widely recognized and considered fundamental to a healthy society.

Businesses planning international transactions will be not challenged by foreign systems of law and procedure, complex rules of international law in many jurisdictions, particularly for business in developing countries with limited resources and foreign experience.

It is for the profession to play its part, a critical part, in meeting the challenge to provide access to justice for all in our society. To do this, the profession will have to innovate. It will have to be prepared to initiate and engage in debate about these issues and to question, and if necessary change, it is current way of doing business.[51]

In the international context, harmonisation claim is more often a claim that nations should adopt similar laws and policies even in the absence of common political authority. Most harmonisation claims are mixed in that they assert both the laws of two jurisdictions should be the same, and that the law of at least one jurisdiction should conform to better, higher or more optimal standard.[52]

In the context of international arbitration, several different laws can be involved. The arbitral proceedings is the law governing the arbitral procedure is important in international commercial arbitration because it determines all matters relating to the conduct and procedure of the arbitration. For example, questions such as how arbitrators are appointed, how they can be challenged, what their powers are concerning the admission of evidence, and other related issues, are all referable to this law.

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[51] Justice Winkelmann *Access to Justice – Who Needs Lawyers* (Ethel Benjamin Address, 2014) p 15.

[52] David Leebron, Seoul Conference on International Trade Law: Integration, Harmonisation and Globalization (1996) at 309.

To make international commercial arbitration effective, it is necessary to implement some mechanism that can ensure that international arbitration institute can be appropriately accessible.

The next step is to review and develop the old concept of national law, adapting it to the developing world. International commercial arbitration proved that this goal is achievable.

The process of harmonisation in the area of arbitral procedural law should move quickly, however, considering the balance between difference and equality, between existing and societies new needs, between rigidity and flexibility and balance between party autonomy and state power. It is in interest of all countries to have flexible and hospitable regimes for arbitration so that their territories become attractive as venues for arbitration.

The adoption of delocalisation by all countries would be more conducive to the goal of unification of arbitral procedural law, as the scope for the intrusion of peculiar domestic laws would be diminished.[53]

A strong trend has emerged toward the reduction of differences in national arbitration law in recent times and this is important to continue to improve and modify the system to meet the needs of today's world of business trade.

Overall, history has proven that the developments in arbitration law can be seen as part of a trend towards unification and harmonisation of international trade law. The key goal of party autonomy has proven to be consistent with the harmonisation process, as most national laws have adopted the party autonomy approach, and have included it a harmonised principle. The time may not be too far away when one will be able to speak of a single law of international commercial arbitration.

[53] Jan Paulsson *Arbitration Unbound: Award Detached from the Law of its Country of Origin* (1981), 30 International and Comparative Law Quarterly at 358.