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**REVIEW OF ARBITRAL AWARDS FOR
BREACH OF NATURAL JUSTICE: AN
INTERNATIONALIST APPROACH**

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Abstract

While international commercial arbitration is widely regarded as an alternative dispute resolution mechanism to litigation in national courts, those courts are frequently engaged in the review arbitral awards in the context of annulment as well as recognition and enforcement. A key purpose of this review is to ensure that the arbitral procedure is consistent with the fundamental principles of natural justice. These principles find their origin in the general principles of law common to civilised nations, and their application is mandated by both the New York Convention and the UNCITRAL Model Law. This paper argues that the content of these principles should be ‘internationalised’. That is, it is both appropriate and desirable that domestic courts, irrespective of the jurisdiction in which they happen to be sitting, apply the basic rules of natural justice in uniform way. It is submitted that this would not only result in a consistent and therefore reliable recognition and enforcement regime, but would also contribute to the success and increased adoption of international arbitration as a key alternative dispute resolution mechanism.

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I. Introduction

In the case of *Methanex Motunui Ltd v Spellman* Fisher J opined that:¹

If the parties [to a dispute] say that they want arbitration, but in the same breath say that they do not want enforceable natural justice, their two statements are incompatible. Arbitration is a process by which a dispute is determined according to enforceable standards of natural justice.

This penetrating *dictum* goes to the heart of the issues surrounding the review of arbitral awards by national courts for the breach of natural justice: even though arbitration is a private dispute resolution mechanism, and (in large part) a creature of contract, the validity of its outcomes ultimately remains subject to fundamental notions of procedural fairness. There thus exists a policy tension between the putative autonomy of the arbitral system and the need to ensure, by judicial supervision, compliance with the basic requirements of due process. Resolution of this tension necessitates consideration of the theoretical bases for arbitration and for natural justice. This analysis takes place in Part II of this paper.

A further set of issues is presented where the arbitration in question is of an international character. In international commercial arbitration an award's binding legal nature is derived at the international level and from international law,² while review of that award by a national court on natural justice grounds occurs at the domestic level, and with reference to the standards of the particular jurisdiction in which that court happens to be sitting. The central submission of this paper is that review of awards on natural justice grounds should be conducted with reference to what the paper terms "internationalised" natural justice standards. It is argued that these standards represent the fundamental core of natural justice, and constitute the criteria both necessary and sufficient to ensure due process and procedural fairness in international commercial arbitration, irrespective of where it occurs and in which jurisdiction its outcome is reviewed. This conclusion will be established as follows.

¹ *Methanex Motunui Ltd v Spellman* [2004] NZLR 95 (HC) at [50].

² *Commentary on the Draft Convention on Arbitral Procedure Adopted by the International Law Commission at its Fifth Session A/CN.4/92 (1955)* at 105 and the authorities there cited.

After the above-mentioned theoretical review in Part II, which will be marshalled to show the appropriateness and desirability of the internationalisation of natural justice, the paper will explore the legal basis for natural justice review of arbitral awards in Part III. Its international origins and current domestic application across a range of jurisdictions will be examined in detail. Part IV will then identify the fundamental problem inherent in those domestic applications – that is, their manifold and sometimes even parochial nature. Their implications and ultimate undesirability will be addressed. Finally, Part V will present the solution: the fundamental core of natural justice will be ascertained, and its viability as an internationally consistent standard will be established with reference to its international origins, universal value and the analogous precedent to be found in the realm of human rights law.

II. The Theoretical Basis for Natural Justice Review of Arbitral Awards

A consideration of the appropriate role of natural justice in the review of arbitral awards by domestic courts must begin with an exploration of its theoretical bases. There is a *prima facie* tension in the reality that the system of international arbitration provides a dispute resolution mechanism which is framed as separate from, and an alternative to proceedings in a domestic court, yet those same courts demonstrate a willingness to nullify the effect of awards which do not meet their particular standards of natural justice. This tension may be said to flow from a lack of clarity as to the exact *nature* of international arbitration, or at least from its unusual legal character.³ A brief examination of the competing positions on this issue will both put the role of natural justice in context and provide a theoretical basis for its internationalisation.

A. The Nature of International Commercial Arbitration

1. Four Theories

³ See generally: Andrew Barraclough and Jeff Waincymer “Mandatory Rules of Law in International Commercial Arbitration” (2006) 6 MJIL.

It may be reasonably put forward that there are four major theoretical conceptions of the nature of international commercial arbitration.⁴ The first conception is essentially contractual. It holds that arbitration is fundamentally based on parties' contractual election to submit their dispute for resolution to a (private) third party.⁵ The principle that *pacta sunt servanda* is emphasised and any "strong links" to national jurisdictions are denied.⁶ The second conception may be termed "jurisdictional". It stresses that international arbitration necessarily occurs within the jurisdiction of a sovereign State and is therefore subject to its supervisory authority.⁷ According to Gaillard, the debate between proponents of these two conceptions resulted in a compromised "hybrid" theory of international arbitration.⁸ This third conception holds that arbitration has a dual nature, relying on both jurisdictional and contractual elements:⁹ the system "must acknowledge the interaction of both its consensual basis and the legitimacy and support conferred on [its processes] by national legal systems."¹⁰ The final conception, rather than defining arbitration with reference to some point on a spectrum between contractual and jurisdictional theories, considers it to represent a wholly autonomous legal order.¹¹ This arbitral legal order has been described as "supra-national" or "trans-national", and is said to be rooted in the perception of international arbitrators that they do not operate on

⁴ Hong-Lin Yu "A Theoretical Overview of the Foundations of International Commercial Arbitration" (2008) 1(2) *Contemp Asia Arb J* 255 at 255-283. See generally: Emmanuel Gaillard *Legal Theory of International Arbitration* (Martinus Nijhoff, Leiden, 2010) at 117.

⁵ Barraclough and Waincymer, above n 3, at 5-6; see also: Julian Lew *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitral Awards* (Dobbs Ferry, Oceana, 1978) at 59.

⁶ Yu, above n 4, at 265.

⁷ *Ibid*, at 258.

⁸ Gaillard, above n 4, at 117.

⁹ Yu, above n 4, at 274.

¹⁰ Barraclough and Waincymer, above n 3, at 6-7; and Okezie Chukwumerije *Choice of Law in International Commercial Arbitration* (Quorum Books, Westport, 1994) at 11.

¹¹ Yu, above n 4, at 278.

behalf of any given State, but rather derive the legitimacy of their function from the consensus of a plurality of States.¹²

2. *Analysis*

At its extreme, the contractual theory would permit parties absolute freedom to determine all aspects of the procedure applying to their arbitration. This would include the ability to contract out of any requirements that natural justice be observed, which would be honoured by a domestic court at the setting aside or enforcement stage. The jurisdictional theory would place more emphasis on the supervisory role of national courts in ensuring that natural justice is complied with, while the hybrid theory – which is said to be the most popular – would suggest the application of a contextual and fact-dependent approach.¹³ The key point is that none of the above three conceptions necessarily precludes the standards of natural justice applied by domestic courts in review of awards being the internationalised ones for which this paper argues. Further, it appears that the conception of arbitration as an autonomous legal order in fact lends support to the proposed adoption of those standards.

Gaillard presents two philosophical justifications for this theory, which he terms “jusnaturalist” and “transnational positivist”.¹⁴ As the name suggests, the jusnaturalist justification proceeds on the basis of natural law: if “higher values” are admitted (and they are by various schools of jurisprudence, as well as implicitly or even unconsciously by many legal practitioners) these may provide a justification for “the existence of a legal order that is superior to legal systems whose only merit is to have been generated by sovereign States”.¹⁵ Indeed, such a supra-national legal order has precedent in the historical *lex mercatoria*. Being universal, that dispute resolution mechanism was associated with no particular State and decided cases *ex*

¹² Yu, above n 4, at 278; and Gaillard, above n 4, at 35-36.

¹³ Barraclough and Waincymer, above n 3, at 11.

¹⁴ Gaillard, above n 4, at 39.

¹⁵ *Ibid*, at 40-41.

aequo et bono – that is, on the basis of higher notions of justice and fairness.¹⁶ It is argued that the *lex mercatoria* is apt for analogy with the current system of international commercial arbitration. As Oppetit astutely observes:¹⁷

[International commercial law] clearly manifests a desire for unity and universality, based on the common needs and interests of the international economic community. As such, it does not accord with a fragmentation of the international legal framework and encourages the use of unifying legal notions, such as *lex mercatoria*, general principles of law, or truly international public policy.

An internationalised set of natural justice standards fits comfortably within such a unifying legal notion. If an autonomous arbitral legal order deriving its ultimate legitimacy from natural law is accepted, this provides a firm jurisprudential foundation for the internationalisation (or “supra-nationalisation”) of the natural justice standards applied in review of arbitral awards.

Gaillard’s “transnational positivist” justification also furnishes support for the internationalisation of natural justice standards. This approach reasons from the fact that “States broadly agree on the conditions that an arbitration must meet in order for it to be considered a binding method of dispute resolution, the result of which, the award, deserves their sanction in the form of legal enforcement”.¹⁸ The approach is positivistic insofar as it holds that arbitrators’ power to adjudicate rests on the ultimate recognition of their awards by states. It is transnational in its holding that, because no one State has a monopoly over an award’s recognition, a system “rising above each national system taken in isolation can be brought about by the convergence of all [national] laws”.¹⁹ This system is not defined in opposition to national laws, but emanates from States’ normative activity. It should be noted that unanimity is not required – it is sufficient that a particular norm commands general

¹⁶ See generally: J H Baker “The Merchant Law and the Common Law” (1979) 38 CLJ 295.

¹⁷ Bruno Oppetit *Philosophie du Droit* (Dalloz, Paris, 1999) at 119.

¹⁸ Gaillard, above n 4, at 46.

¹⁹ *Ibid.*

acceptance. In addition, this approach is said to facilitate and even accelerate the evolution of national laws towards greater consistency and away from “particularist solutions”.²⁰ If it can be shown that a fundamental core of natural justice principles constitutes a norm flowing from the activity of a majority of states (and it will be shown below), this approach may also provide a jurisprudential basis for the internationalisation (or “trans-nationalisation”) of the standards of natural justice applied in review of awards.

B. The Intersection of Natural Justice and Arbitral Autonomy

Having examined the major theories as to the nature of international arbitration, it is profitable to explore the key policy considerations to which the application of natural justice gives rise, namely those inherent in the tension between the private and flexible nature of arbitration and the requirement of ensuring some minimum standards of procedural fairness. Such an enquiry is useful because it furnishes a framework through which decision-making in this area may be understood and analysed – it illuminates the concerns which motivated the development of the *status quo* and provides points of reference for the consideration of potential developments in the future, including for present purposes the internationalisation of natural justice. Four major policy themes may be identified.

1. Integrity of the Arbitral System

A first consideration is the need to preserve the integrity and legitimacy of the arbitral system. This supports a robust interpretation of natural justice principles. As Pullé observes, this need is becoming increasingly important for two reasons.²¹

First, arbitrations are increasingly being held in countries which have neither an established culture of arbitration nor history of perfect observance of the rule of law (at least in its Western conception). In 2011, for example, an Australian court found that an award issued in Mongolia should be not enforced in Australia due to its breaches of natural justice and consequent inconsistency with Australian public

²⁰ Gaillard, above n 4, at 50-52.

²¹ Austin Pullé “Securing Natural Justice in Arbitration Proceedings” (2012) 20 APLR 64 at 65-66.

policy.²² This was so because a large award of damages had been issued against a company which was not party to the agreement to arbitrate. This point is particularly important in the context of smaller commercial entities, who are often obliged to sign standard form contracts which “mandate arbitration in a foreign land, [under] a foreign governing law and a foreign *lex arbitri*”.²³ There is also suggestion that arbitrators may be motivated to issue awards against smaller parties in the hope of being re-appointed as arbitrators in future arbitrations by more powerful parties.²⁴

Secondly, against the background of parties increasingly having recourse to arbitration instead of litigation as their preferred dispute resolution mechanism, it can be seen that awards are more internationally potent than court judgments in terms of their enforceability.²⁵ This is because the grounds for refusing enforcement of awards are narrower than those for refusing enforcement of foreign judgments. Further, enforcement of a judgment depends on its recognition by a given foreign judgment statute, whereas “awards are portable and can be enforced in the more than 150 countries that are parties to the [New York Convention]”.²⁶

2. *Finality of Awards*

A second consideration is that arbitral awards are designed to represent the final resolution of a dispute between parties. At first glance, this factor militates in favour of a comparatively restrained approach to natural justice review. On the other hand, it is possible to conceive that if national courts were particularly vigorous in their insistence on arbitrators’ compliance with natural justice standards, the latter would be incentivised to observe them strictly. This would in turn lead to fewer awards

²² *IMC Aviation Solutions Pty Ltd v Altain Khuder* [2011] VSCA 248.

²³ *Ibid.* See also: *Aloe Vera of America Inc v Asianic Food (S) Pte Ltd* [2006] SGHC 78.

²⁴ Pullé, above n 20, at 65-66. See also: Ruth Glick “California Arbitration Reform: The Aftermath” (2003) 38 USFL Rev 119.

²⁵ See: Albert Jan van den Berg “New York Convention Countries” (2009) New York Arbitration Convention < <http://www.newyorkconvention.org/contracting-states/list-of-contracting-states>>.

²⁶ Pullé, above n 21, at 65-66.

being set aside or refused enforcement, thus upholding their finality. The factor's importance has been recognised by courts from various jurisdictions and is emphasised in a number of arbitration statutes.²⁷ The International Arbitration Act 1974 (Cth), for example, provides in s 39(2) that a court making a determination under that Act must "have regard to the fact that awards are intended to provide certainty and finality".

3. *Autonomy*

A third consideration is that by agreeing to arbitrate, parties intend remove their dispute from national courts in favour of private dispute resolution. Courts have recognised this and have therefore exhibited a willingness to allow a degree of "indulgence" with respect to arbitrators' compliance with natural justice principles. This is for four reasons. First, in choosing arbitration parties "trade the formality and the punctiliousness of a court proceeding in return for something quick and informal with the inevitable result that some corners will be cut".²⁸ Secondly, because arbitration is comparatively informal and private, rule of law concerns that justice be upheld in public are not of critical importance.²⁹ Thirdly, most jurisdictions do not wish to be seen as hostile to arbitration by engaging in too high a level of scrutiny on natural justice grounds. In fact, jurisdictions compete amongst themselves to attract "lucrative arbitration business",³⁰ and one way to do this is to restrain national courts' interference with awards as much as possible. Finally, because award-debtors frequently attempt to resist the enforcement of awards on natural justice grounds, such claims can become "jaded", and as a result courts may require increasingly higher thresholds to be met and evidential burdens discharged.³¹

²⁷ See for example: *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* [2012] FCA 1214, at [30].

²⁸ Pullé, above n 21, at 67.

²⁹ *Ibid*, at 67-68.

³⁰ *Ibid*.

³¹ *Ibid*.

Respect for the comparative autonomy of the arbitral system is important. However, it has the potential to reduce the protections afforded to parties to arbitrations. This can be seen in the case of *Sermalt Holdings SA v Nu-Life Upholstery Repairs Ltd*, in which Bingham J observed that a national court will be unwilling to subject an arbitrator's decision-making process to strict review, even where such review would have been required if the decision had been made by a judge or administrative official.³²

4. *International Consistency*

A final matter in considering the application of natural justice in review of arbitral awards is that, because different jurisdictions may have different standards of "natural justice" there is the risk that the setting aside and refusal of recognition and enforcement regimes will be excessively inconsistent on the international plane. This would not only have negative consequences for predictability,³³ but would also result in a situation where the validity or enforceability of an award would turn on the particular jurisdiction where the award was issued or where it was sought to be enforced, which could be entirely fortuitous. In addition, it could exacerbate existing problems of forum shopping. There is thus good reason for courts to interpret the natural justice ground of review in an internationally consistent way.

III. The Legal Basis for Natural Justice Review of Arbitral Awards

It is to the legal basis for review of arbitral awards on the grounds of natural justice that the paper will now turn. It first examines the international origins of that basis in general principles of law, and then in specific formal international instruments. This analysis will show how the application of natural justice in international arbitration was developed in a decidedly international spirit. The paper will then examine how natural justice is applied by national courts in the domestic context,

³² *Ibid.* See also: *Sermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] EGLR 14.

³³ Barraclough and Waincymer, above n 3, at 8.

with a consideration of its content as elucidated by (primarily) Australasian case law.

A. The International Origins of Natural Justice Review of Arbitral Awards

1. General principles of law common to civilised nations

It is submitted that the notion that arbitral awards may and ought to be reviewable on the grounds of breach of natural justice constitutes a general principle of law recognised by civilised nations. As such, it exists on the plane of international law by virtue of Article 38(1)(c) of the Statute of the International Court of Justice. It is further submitted that the broad principle comprises a number of other more specific general principles which together form the essential skeleton of natural justice: that the adjudicator be impartial and that all parties have an opportunity to present their case.

(a) No one may be a judge in his or her own case

The first general principle of law which falls within the ambit of natural justice is that *nemo debet esse iudex in propria sua causa* – no one may be a judge in his or her own case, or the rule against bias.³⁴ There is a near universal acceptance of this principle, and it is supported by considerable authority. Though this paper is not an historical essay, a consideration of the historical significance and evolution of the principle is vital in establishing its content and universal pedigree. To that end, the follow brief survey will suffice.³⁵

One of the grounds for an award's annulment under the International Law Commission's 1955 Draft Convention of Arbitral Procedure is that "that there has been a serious departure from a fundamental rule of procedure".³⁶ One such

³⁴ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, New York, 2006) at 279 and 357.

³⁵ See: *Ibid*, at 279-289; *Commentary on the Draft Convention on Arbitral Procedure Adopted by the International Law Commission at its Fifth Session A/CN.4/92* (1955) at 55-56.

³⁶ *International Law Commission Commentary*, above n 35, at 105.

fundamental rule is that parties have a right to “impartial treatment”.³⁷ Though the principle can be traced back to (at least) Greek and Roman times, the Commission’s earliest authority is Pufendorf, who writing in 1688 said:³⁸

[An arbitrator’s] decision will surely not be binding upon us if it is perfectly obvious that he connived with the other party, or was corrupted by presents from him, or entered into an agreement to defraud us. For whoever clearly leans to one side or the other is unfitted further to pose as an arbitrator.

The same sentiment was expressed by such eminent scholars as Bluntschli, Hall, Balasko, Carlston and Goldschmidt.³⁹ An early arbitration which engaged the principle may be found in *The Virginius Incident*. In that case an American ship was captured by a Spanish naval vessel and 53 members of its crew – including Americans, Britons and Cubans – were tried and executed by the Spaniards. The incident immediately gave rise to a dispute between the American and Spanish governments, to be settled by international arbitration. The British government was asked to act as an arbitrator, but considered that it would be disqualified from doing so because it was itself likely to be a party to the arbitration.⁴⁰ As it was stated in the *Rudloff Case*: “the jurisprudence of civilised States and the principles of natural law...guarantee to both [parties] the hearing and decision of a disinterested and impartial tribunal”.⁴¹ Other cases have made similar findings.⁴² A common thread

³⁷ *Ibid*, at 110.

³⁸ *Ibid*, at 106 and the authorities there cited.

³⁹ *Ibid*, at 106-110.

⁴⁰ *The Virginius Incident* 65 BFSP (1873-1874) 102. This award does not appear to be in the UNRIAA database. Cheng, above n 34 is relied upon. See generally: Richard Bradford *The Virginius Affair* (Colorado Associate University Press, Boulder, 1980).

⁴¹ *Rudloff Case* (1903-1905) IX UNRIAA 255 at 258.

⁴² See: Cheng, above n 34, at 279-289 and the authorities there cited. As examples of more recent cases, albeit in domestic contexts see: *Sunrider Singh Kanda v Government of Malaya* [1962] UKPC 2, *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 557 (CA), *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119, *Auckland Casino Ltd v Casino Control Authority Ltd* [1995] 1 NZLR 142 and *Man O’War Station Ltd v Auckland City Council (No 1)* [2002] 3 NZLR 577.

running through this jurisprudence is that the sources of the rule against bias are said to be both natural law, and general principles of law emanating from the practice of States. It is worth noting the parallel between this and Gaillard's two justifications for the existence of an arbitral legal order mentioned above.

(b) *Each party must be given the opportunity to present its case*

The second general principle of law falling within the scope of natural justice is that *audiatur et altera pars* – all parties should be heard.⁴³ Referred to as the hearing rule, the principle holds that each party must be given adequate notice of proceedings, the opportunity to present and challenge evidence and to have that evidence properly considered. The principle has distinguished origins: it is said to have its roots in the *Magna Carta*.⁴⁴ It is one of the grounds for nullity under the 1955 Draft Convention of Arbitral Procedure and one of Bluntschli's principles rendering an award void.⁴⁵ Moreover, it is supported by unequivocal statements from Heffter, Goldschmidt, Carnazza-Amari and Fauchille.⁴⁶ It also has a history of application by international tribunals and courts.

In 1926 a Belgo-German Mixed Arbitral Tribunal, in reviewing awards against the city of Antwerp issued by special German arbitral tribunals set up in Belgium during the First World War said, in light of the fact that the city was unable to be represented through no fault of its own: "The absence of the defendant party destroyed the equilibrium between the parties which would have existed before the ordinary tribunals and would, therefore, have resulted in excessive sentences on the City of Antwerp".⁴⁷ This constituted a "fundamental defect" in the arbitral

⁴³ Cheng, above n 34, at 290. This principle is also referred to by the phrase *audi alteram partem*: hear the other party.

⁴⁴ See: *Magna Carta* (1297) 25 Edw 1, c 39. See also: S E Edeko "The Protection of the Right to Fair Hearing in Nigeria" (2011) 1(1) SJHR 68.

⁴⁵ *International Law Commission Commentary*, above n 35, at 117.

⁴⁶ See: *Ibid*, at 110.

⁴⁷ *Ville d'Anvers Case (Indemnity)* (1926) 6 TAM 749 at 752. This award does not appear to be in the UNRIAA database. Cheng, above n 34, at 291 is relied upon.

procedure.⁴⁸ As the *Salvador Commercial Co* case held: “due process of judicial proceedings” requires “notice [and] full opportunity to be heard...”⁴⁹ According to Cheng, explicit refusal to hear one of the parties in an international judicial proceeding may be said never to have happened.⁵⁰ He notes, however, the “*Umpire Cases*” before the Granadine-United States Claims Commission, in which the Umpire stated that “some remarks [had been] made as to a hearing on the merits...[but] as no further measures were taken for a hearing, at the last moment, as the Commission was expiring, I filed the awards”.⁵¹ This failure to hear argument on the merits before passing judgment on them constituted a procedural “insufficiency” and rendered the award null.⁵² It is important to recognise that the principle requires not only that a party be afforded the opportunity to present its case, but also the opportunity to respond to the case of the other party. Such a procedure was included in numerous international dispute resolution treaties, including the Hague Convention of 1907, the Statute of the International Court of Justice and the Statute of the Permanent Court of International Justice.⁵³ The principle also operates to ensure that a party is able to reply to, or comment upon any newly adduced evidence or alteration or amendment of the legal basis of the claim.⁵⁴ It does not, however, protect a party who has had a reasonable opportunity to be heard, but has declined that opportunity by absenting itself or otherwise wilfully failing to present

⁴⁸ *Ibid.*

⁴⁹ *Ibid*; *Mixed Claims Commission United States-Venezuela* (1930) IX UNRIAA 113, at 275.

⁵⁰ Cheng, above n 34, at 291.

⁵¹ *Ibid*, at 291-292.

⁵² *Ibid*, at 292.

⁵³ See Cheng, above n 34, at 293 and the authorities there cited.

⁵⁴ *Eastern Greenland Case* (1933) PCIJ A/B 53.. This award does not appear to be in the UNRIAA database, though is cited as above there and available online at <http://www.worldcourts.com/pcij/eng/decisions/1933.04.05_greenland.htm>; and Cheng, above n 34, at 295.

its case, without valid reason.⁵⁵ This aspect of the principle is well summarised by Article 53 of the Statute of the Permanent Court of International Justice (reproduced in essence in Article 53 of the Statute of the International Court of Justice): “Whenever one of the parties shall not appear before the Court, or shall fail to defend his case, the other party may call upon the Court to decide in favour of his claim”.⁵⁶

In addition to its international application, the principle has long been applied domestically by civilised States. In the criminal context, Lord Fortesque famously stated in *R v Chancellor and Scholars of the University of Cambridge (Dr Bentley’s Case)*:⁵⁷

The laws of God and Man both give the party an opportunity to make his defence, if he has any. I remember to have had it observed by a very learned man upon such an occasion that even God Himself did not pass sentence upon Adam before he was called upon to make his defence.

It is again noteworthy that the principle’s foundations are said to be both natural law (albeit expressed in religious language) and general principles of law common to mankind. Other cases in which the principle has been applied include *Ridge v Baldwin*, *R v Secretary of State for the Home Department*, ex parte *Doody* and *Secretary of State for the Home Department v AF*.⁵⁸

2. Formal legal instruments

Having examined the origins of the two fundamental principles of natural justice as general principles of law common to civilised nations, it will now be profitable to give a more detailed consideration to the translation of those principles in particular

⁵⁵ *Electricity Company of Sofia and Bulgaria* (1939) PCIJ A/B 77. This award does not appear to be in the UNRIIAA database, though is available online at <http://www.worldcourts.com/pcij/eng/decisions/1939.04.04_electricity1.htm>.

⁵⁶ For an example of the Article’s application see: *Corfu Channel Case* (Compensation) (1949) ICJ Rep 244.

⁵⁷ *R v Chancellor of Cambridge and Scholars of the University of Cambridge* (1723) 1 Str 557.

⁵⁸ *Ridge v Baldwin* [1963] AC 40 (HL), *R v Secretary of State for the Home Department*, ex parte *Doody* [1994] 1 AC 531 (HL) and *Secretary of State for the Home Department v AF* [2010] 2 AC 269 (HL).

international instruments. Before exploring the main instruments with which this paper is concerned – the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the UNCITRAL Model Law on International Commercial Arbitration⁵⁹ – it will be useful here to canvass a selection of other similar instruments which enshrine natural justice principles, in addition to the Statute of the International Court of Justice mentioned above. This will lend further weight to the argument that these principles are of a trans-national nature.

Under the UNCITRAL Arbitration Rules parties must communicate notice of any arbitration (Articles 3 and 4), and must be treated with equality as well as given a reasonable opportunity to present their case (Article 17).⁶⁰ The ICSID Convention allows for review of an award on the ground that there has been a serious departure from a fundamental rule of procedure, which “[includes] under its ambit the so-called principles of natural justice”.⁶¹ Article 11 of the ICC Arbitration Rules requires arbitrators to “remain impartial and independent” and Article 22 mandates that the Tribunal “act fairly and impartially and ensure that each party has a reasonable opportunity to present its case”.⁶² Article 14 of the London Court of International Arbitration’s Rules contains the same provision in materially identical language.⁶³ Similar rules can be found in other arbitration rules and model procedures. The important point, however, is that the principles of natural justice clearly operate on the international level, and there appears to be broad agreement as to their generalised content.

⁵⁹ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 330 UNTS 38 (the New York Convention); and UNCITRAL Model Law on International Commercial Arbitration (21 June 1985) (the Model Law).

⁶⁰ UNCITRAL Arbitration Rules (25 June 2010), arts 3, 4 and 17.

⁶¹ Convention on the Settlement of Investment Disputes between States and Nations of Other States (14 October 1966), art 52; and ICSID *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1970) Vol II at 480.

⁶² International Chamber of Commerce (ICC) Rules of Arbitration 2010, arts 11 and 22.

⁶³ London Court of International Arbitration (LCIA) Arbitration Rules 1998, art 14.

(a) *The New York Convention and the UNCITRAL Model Law*

The New York Convention of 1958 relevantly provides that the domestic recognition and enforcement of an arbitral award may be refused if “the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case”.⁶⁴ It also provides that a national court can refuse recognition and enforcement where such recognition and enforcement would be “contrary to the public policy of that country”.⁶⁵ Adopting this language, Article 34 of the Model Law allows for the setting aside of an award on those two grounds, while Article 36 allows for the refusal of recognition and enforcement, again on those two grounds. Article 18, in addition, provides that parties must be treated with equality and given the opportunity to present their case.⁶⁶

It is at this point worth giving consideration to the curious fact that, while the New York Convention and Model Law enumerate exclusive grounds for the setting aside and refusal of recognition and enforcement of arbitral awards,⁶⁷ and certainly include some form of natural justice among those grounds, the words “natural justice” (or the arguably equivalent terms “due process” or “procedural fairness”) are not used. It appears *prima facie* that only the hearing rule is explicitly stated. While the reality that the ground in question is not in fact limited to the hearing rule is discussed below with respect to the text and utility of the instruments,⁶⁸ it is useful here to confront this ambiguity in light of their development and context. As a starting point, the predecessor to the New York Convention – the Geneva Convention on the Execution of Foreign Arbitral Awards – contained a natural justice exception applying in circumstances where “the party against whom [it] is sought to use the award was not given notice of the arbitration

⁶⁴ New York Convention, above n 59, art V(1)(b).

⁶⁵ *Ibid.*

⁶⁶ UNCITRAL Model Law, above n 59, arts 18, 34 and 36.

⁶⁷ New York Convention, above n 59, art V(1); *ibid* arts 34(1) and 46(1).

⁶⁸ At IV(B).

proceedings in sufficient time to present his case”.⁶⁹ It is worth observing that the focus of the provision was exclusively on a lack of *notice* as causative of breach of the hearing rule. But in fact the hearing rule may be breached in numerous other ways. Given this necessity for a broader construction, it appears that the provision was not interpreted textually, but rather “cover[ed] all cases involving a serious violation of due process”.⁷⁰ It is submitted that the position with respect to the New York Convention is analogous. Indeed, a certain broadness of principle in the natural justice exception is hinted at in the *Conflict of Laws*: “[The] ground is in substance a defence of absence of natural justice... [which] gives effect to a general principle of law...”⁷¹ This is not dissimilar to one exception to the recognition and enforcement of a foreign judgment, which may be impeached if the proceedings in which it was obtained were “opposed to natural justice”.⁷² In the interests of comparison, and adding further weight to the submitted broadness of the natural justice exception in the arbitration context, it is worth noting that one ground for refusal of recognition and enforcement of an award at common law was also that “the proceedings in which it was obtained were opposed to natural justice”.⁷³

The contention that the natural justice exception is not limited to a strict textual construction finds strong support in the relevant *travaux préparatoires*. At UNICTRAL’s 18th session, a concern was raised that the enumerated grounds for setting aside and refusal of recognition and enforcement under the Model Law may be too restrictive and insufficient to cover all procedural injustices which merited supervisory intervention.⁷⁴ The treatment of this concern with respect to the natural

⁶⁹ Convention on the Execution of Foreign Arbitral Awards 92 LNTS 302 (1929-30) art 2(1)(b).

⁷⁰ Albert Jan Van den Berg *New York Arbitration Convention of 1985* (Kluwer Law and Taxation Publishers, The Hague, 1981) at 297. See also: H W Greminger, *Die Genfer Abkommen von 1923 und 1927 über die international private Schiedsgerichtsbarkeit* (Verlag P G Keller, Winterthur, 1957).

⁷¹ Dicey, Morris and Collins *The Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2012) at 891.

⁷² See: *Ibid*, at 740-745.

⁷³ *Ibid*, at 882-883.

⁷⁴ See: UNCITRAL, Report of the United Nations Commission on International Trade Law on the work of its eighteenth session *Official Records of the General Assembly, Fortieth Session, Supplement No 17* (3-21 June 1985) UN Doc A/40/17 at [277].

justice ground for the setting aside of an award (Article 34(2)(a)(ii)) is particularly instructive. It was proposed that the exception be supplemented by incorporation of the wording of (what was then) Article 19(3).⁷⁵ Article 19(3) materially provided that “the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case”.⁷⁶ (This is identical to what is now Article 18). However, the proposal was not adopted because:⁷⁷

the alignment between articles 34 and 36 was thought to be more important than the alignment between articles 34 and [18] and that it was the Commission’s understanding that, in spite of the resulting difference between the text of article [18] and article 34(2)(a)(ii), any violation of article [18] would constitute a ground for setting aside the award under article 34(2) subparagraph (a)(ii), subparagraph (a)(iv) or subparagraph (b) and that the concerns which led to the proposal to amend subparagraph (a)(ii) were, therefore, already met.

The import of this history is that UNCITRAL considered that the natural justice exception in Article 34(2)(a)(ii) could operate as a ground for setting aside an award because of a breach of the broader natural justice requirements enshrined in Article 18. The apparent textual circumscription of Article 34(2)(a)(ii) in only covering the hearing rule is illusory: it includes the rights enshrined in Article 18, one of which is the rule against bias. It appears that this was not made explicit due to stylistic considerations which prevailed during the drafting process. It is curious that the broader rights in Article 18 were not simply incorporated into both Articles 34(2)(a)(ii) and 36(1)(a)(ii) given that this would have resolved the alignment concerns. While this point does not appear to have been addressed in the *travaux préparatoires*, it is submitted that a reasonable assumption may be made that the broader approach to Article 34(2)(a)(ii) applies also to Article 36(1)(a)(ii).

B. Domestic Application

⁷⁵ *Ibid*, at [287].

⁷⁶ *Ibid*, at [170].

⁷⁷ *Ibid*, at [302].

In light of the above discussion of the international origins and sources of natural justice and its application in review of arbitral awards, the paper will now turn to the domestic legal bases for that review, which flow, generally speaking, from the adoption of the New York Convention and the Model Law (or the enactment of statutes in essentially similar terms). This is the position in New Zealand and Australia. Schedule 1 of the Arbitration Act 2006 (NZ) reproduces (with certain amendments) the Model Law, and by s 16 of the International Arbitration Act 1974 (Cth) provide that (subject to certain provisions) the Model Law has the force of law in Australia. The paper will first examine the general standards of review applied with respect to natural justice, then specific examples of its content drawn from a number of Australian and New Zealand cases.

1. *The general standard required for breach of natural justice*

The modern jurisprudence on the appropriate scope of the natural justice ground for appears to suggest two broad approaches. The first requires a comparatively serious and fundamental breach of natural justice to render an award subject to setting aside and refusal of recognition and enforcement; whereas the second holds that *any* breach of natural justice is *prima facie* sufficient for that purpose.

The first approach finds early expression in the United States case of *Parsons & Whittlemore Overseas Co v Societe Generale de L'Industrie du Papier (RATKA)*, in which the Court found that enforcement under Article V of the New York Convention should be refused only where it would “violate the forum state’s most basic notions of morality and justice”.⁷⁸ Though this case was concerned primarily with the public policy exception, that exception is often regarded as intrinsically bound up with the natural justice exception and statements relating to the former are applied in the context of the latter (this point is taken further below). The Court was motivated to make its finding as follows. First, it was contended that “the legislative history of the provision offers no certain guidelines to its construction”.⁷⁹ The precursors to the

⁷⁸ *Parsons & Whittlemore Overseas Co v Societe Generale de L'Industrie du Papier (RATKA)* 508 F 2d 969 (2d Cir) 1974 at 974; see also *Castel Electronics* above n 27, at [9].

⁷⁹ *Ibid*, at [7].

New York Convention had extended the exception to awards “contrary to principles of law” and awards which violated “fundamental principles of the law”. While one commentator suggested that the Convention’s failure to include similar language signified a narrowing of the defence,⁸⁰ others were of the view that the omission was indicative of an intention to broaden it.⁸¹ On balance, the Court was persuaded by the Convention’s pro-enforcement bias and pragmatic considerations of reciprocity:⁸²

Perhaps more probative, however, are the inferences to be drawn from the history of the Convention as a whole. *The general pro-enforcement bias informing the Convention and explaining its suppression of the Geneva Convention*⁸³ points toward a narrow reading of the public policy defence. An expansive construction of this defence would vitiate the Convention’s basic effort to remove pre-existing obstacles to enforcement... Additionally, considerations of reciprocity – considerations give express recognition in the Convention itself [in Article XIV] – counsel courts to invoke the public policy defence with caution lest foreign courts frequently accept it as a defence to enforcement of arbitral awards rendered in the United States [emphasis and citations added].

A similarly narrow approach was taken by the English Court of Appeal in *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v Shell International Petroleum Co Ltd*, with Lord Donaldson adding that consideration of the ground “should be approached with extreme caution”.⁸⁴ The approach has also found favour in cases from Hong Kong, Canada, and Singapore.⁸⁵ It was taken up by the New Zealand Court of Appeal in *Amaltal Corporation Ltd v Maruha (NZ) Corporation* which suggested, *inter*

⁸⁰ Paolo Contini “International Commercial Arbitration” (1959) 8 Am J Comp L 285 at 304.

⁸¹ Leonard Quigley “Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards” (1961) 70 Yale LJ 1049 at 1070-1071; *Parsons & Whittlemore*, above n 78, at [7].

⁸² *Ibid*, at [8].

⁸³ The predecessor to the New York Convention.

⁸⁴ *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v Shell International Petroleum Co Ltd* [1990] 1 AC 295.

⁸⁵ *Hebei Import and Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKC 205; *Attorney General of Canada v SD Myers Inc* [2004] 3 FCR 368; and *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597.

alia, that the natural justice ground could only be invoked where “fundamental principles” had “obvious[ly]” been breached.⁸⁶ Similarly, the High Court in *Downer-Hill Joint Venture v Government of Fiji* the Court stated at [84] that:⁸⁷

Even assuming that Downer could establish is a breach of...natural justice, the ‘public policy’ requirement in art 34 [of the Model Law] imposes a high threshold on Downer. The phrases ‘compelling reasons’ and ‘a very strong case’ are employed in [the precedential *Hebei* decision.⁸⁸] [T]here must be the likelihood that the identified procedural irregularity resulted in a ‘substantial miscarriage of justice’.

These restrictive frameworks are likely to be, at least in part, a product of the factual and procedural matrices from which they arose. In the *Downer-Hill* case the Fijian Government contracted Downer, a construction company, to upgrade certain highways in Fiji.⁸⁹ There was a dispute as to the amount payable, which was referred to arbitration pursuant to the contract. The Tribunal found in favour of the Government of Fiji. Downer applied to set aside the award in New Zealand under Article 34 based on various assertions of breaches of natural justice and public policy constituted by, *inter alia*, an alleged lack of evidence in support of the Tribunal’s findings, a failure to determine one of Downer’s claims and the denial of an opportunity for Downer to be heard. Following this, the Government of Fiji applied to strike out Downer’s application on the grounds that it disclosed no reasonable cause or action or was otherwise an abuse of the Court’s processes. The Court held that Downer’s claims were essentially unfounded: the evidentiary basis for the award was sufficiently indicated, all issues were addressed and there was no breach of the hearing rule (in addition, some of Downer’s claims were time-barred). It is a reasonable inference that the in the circumstances where an application is essentially unfounded, or at least where the impugned award contains no obvious breach,⁹⁰ a

⁸⁶ *Amaltal Corporation Ltd v Maruha (NZ) Corporation* [2004] 2 NZLR 614; see also *Castel Electronics* above n 27, at [47]-[51].

⁸⁷ *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554.

⁸⁸ See: *Hebei Import and Export Corp v Polytek Engineering Co Ltd*, above n 85.

⁸⁹ The facts are summarised from *Downer-Hill Joint Venture*, above n 87, at [1]-[22].

⁹⁰ See: *Ibid*, at [84].

high threshold will apply. This is consistent with “the recognised benefits of arbitration [which] include speed, economy...and finality”.⁹¹ There is an implicit downplaying of the Court’s supervisory role in situations where a breach is not “at least fairly readily apparent”.⁹² A similarly narrow approach has been adopted in various Australian cases.⁹³

The second general approach, deeming any breach of natural justice to be contrary to public policy and thus capable of justifying the setting aside or refusal of recognition and enforcement finds support in a more limited number of Australian and New Zealand cases. The Court in *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* stated at [29] that:

The plain words of [the International Arbitration Act 1974] unambiguously declare that if *any* breach of natural justice occurs in connection with the making of the award then, for the purposes of arts 34 and 36 [of the Model Law], the award is in conflict with or contrary to the public policy of Australia.

This was consistent with the reasoning of the Supreme Court of Victoria in *IMC Aviation Solutions Pty Ltd v Altain Khuder*.⁹⁴ Additionally, the conclusions in *Castel Electronics* were adopted in New Zealand by Courtney J in *Ironsands Investments Ltd v Toward Industries Ltd*.⁹⁵

Though the above two approaches are distinct in requiring different degrees of severity of breach of natural justice to allow an award to set aside or subject to refusal of recognition or enforcement, it seems that in practice both approaches are likely to lead to similar outcomes. This is because those jurisdictions which adopt the second approach – Australia and New Zealand – are of the view that their courts

⁹¹ *Ibid*, at [62].

⁹² See: *Ibid* at [60-61].

⁹³ See: *Castel Electronics*, above n 27; and *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415 at [132].

⁹⁴ *IMC Aviation Solutions Pty Ltd v Altain Khuder* [2011] VSCA 248, at [35], [37] and [129].

⁹⁵ *Ironsands Investments Ltd v Toward Industries Ltd* CIV-2010-404-004879, 8 July 2011 at [19]. See also: Daniel Kaldermis “Arbitration and Administrative Law – When Two Worlds Collide” (2012) Kluwer Law International <<http://kluwer.practicesource.com/blog/2012/>>.

retain an ultimate discretion as to whether or not to interfere with an award, notwithstanding that it may *prima facie* satisfy the setting aside or refusal of recognition and enforcement provisions of their respective Arbitration Acts.⁹⁶ As Courtney J noted in *Ironsands*, “[i]t is unlikely that the Court would exercise its discretion to set aside an award where the relevant breach of natural justice is minor and could have had no bearing on the outcome”.⁹⁷

2. *Specific illustrations*

The following cases constitute examples of the circumstances in which courts have and have not been willing to set aside or to refuse to recognise and enforce awards on the grounds of natural justice. A good example of the application of the hearing rule is found in *A-G v Tozer (No 3)*.⁹⁸ In that case a significant piece of documentary evidence was provided to the arbitrator, but was not provided to the other party, which therefore had no opportunity to challenge it. Because the arbitrator had relied on the document in making the award, it was found to entail a breach of natural justice in that the party without access to the document was denied the opportunity of properly presenting its case.⁹⁹ In contrast, claims based on alleged breaches of the hearing rule were denied in *Hirstich v Kahotea* and *Hi-Gene Ltd v Swisher Hygiene Franchise Corp*.¹⁰⁰ In the former case the applicant claimed that she had been unable to present her case because there had been no oral hearing. This was held not to be the case, however, because parties to the arbitration had previously agreed to conduct the hearing on the basis of written submissions.¹⁰¹ The latter case centred on the respondent’s allegation that it was denied the opportunity to present its case because it was unfairly refused an adjournment. However, it transpired that the

⁹⁶ *Castel Electronics*, above n 27, at [33]; and *Ironsands Investments*, above n 25, at [20].

⁹⁷ *Ironsands Investments*, above n 95, at [20].

⁹⁸ *A-G v Tozer (No 3)* HC Auckland M1528-IM02; CP607/97, 2 September 2003; see also *Green and Hunt on Arbitration Law and Practice* (Online Looseleaf Ed, Brookers).

⁹⁹ *Ibid.*

¹⁰⁰ *Hirstich v Kahotea* HC Auckland M/404/184SW02, 3 April 2003; and *Hi-Gene Ltd v Swisher Hygiene Franchise Corp* [2010] NZCA 359.

¹⁰¹ *Ibid*; *Green and Hunt*, above n 98.

respondent had in fact failed to directly ask the Tribunal for an adjournment until just before the hearing, and did not provide a reasonable explanation for requesting one.¹⁰² In these circumstances the Court found that there was no breach of natural justice. As another ground for breach, it was suggested in *Westport Insurance Corporation v Gordian Runoff Ltd* that the failure of a Tribunal to provide adequate reasons for its decision may also qualify.¹⁰³

In addition, the principles of natural justice will be breached where an award makes a finding on an issue that was not raised during proceedings, but may be of later relevance to a party. This was the position in *Todd Petroleum Mining Co Ltd v Shell (Petroleum Mining) Co Ltd*.¹⁰⁴ It also occurred in the *Ironsands* case, the facts of which are as follows.¹⁰⁵ The claimant, Cheung Kong Infrastructure Holdings Ltd (CKI) contracted to purchase an iron mining operation owned by New Zealand Steel Ltd (NZS). Under this contract, CKI was bound to use all reasonable endeavours to obtain consent for its investment from the Overseas Investment Office. Subsequent to entering into the contract CKI made the decision that upon purchase of the mining operation it would close it down, and advised the Office of this fact. The Office refused investment consent. NZS alleged that CKI had breached its contractual obligations, and this was accepted by an arbitrator, who found CKI's decision to close the mining operation was incompatible with its obligation to use all reasonable endeavours to obtain investment consent. CKI's obligation of honesty requiring it to notify the Office of its decision did not immunise it from this breach of contract. CKI's application to set the award aside was partially successful. The arbitrator had made a finding that investment consent *would* have in fact been obtained but for CKI's decision to close the mine. This was capable of constituting a breach of natural justice: the arbitrator was only required to find whether CKI took reasonable endeavours to obtain consent – he need not have considered the likelihood of

¹⁰² *Hi-Gene Ltd v Swisher Hygiene Franchise Corp*, above n 100; and *Green and Hunt*, above n 98.

¹⁰³ *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37.

¹⁰⁴ *Todd Petroleum Mining Co Ltd v Shell (Petroleum Mining) Co Ltd* HC Wellington CIV-2008-485-2816, 17 July 2009; and *Green and Hunt*, above n 98.

¹⁰⁵ *Ironsands Investments*, above n 95.

consent being granted. That factor was to be relevant in the later determination of a remedy. By deciding the issue of likelihood the arbitrator had effectively pre-empted argument on this issue, meaning that CKI had not had an opportunity to be heard thereon.

It is useful at this point to give detailed consideration to a prominent case in the enforcement of foreign judgments context – *Adams v Cape Industries Plc*.¹⁰⁶ This is so because, in addition to the analogous nature of the enforcement of foreign judgments to the enforcement of arbitral awards, the discussion of natural justice in the case is relevant as representing a leading school of thought on the subject in the wider common law world. Because that discussion can only be fully appreciated in light of the facts of the case, it is to those which the paper now turns.¹⁰⁷ Cape was the English parent of a group of companies engaged in the mining and marketing of asbestos. The worldwide marketing was handled by another English company, Capasco; while the marketing in the United States was conducted by a United States company, NAAC. Both were wholly owned subsidiaries of Cape. A further South African subsidiary mined the asbestos, which was sold for use in a factory in Texas. In 1974, some 462 plaintiffs, most of whom were employees or former employees of the Texas factory brought an action in the Federal District Court in Tyler, Texas (the Tyler 1 actions). Cape, Capasco, NAAC and the South African subsidiary were named as defendants, in addition to the Government of the United States. Though Cape and Capasco protested the Tyler court's jurisdiction, the actions were settled in 1977 for \$20 million, of which Cape and its subsidiaries bore \$5 million. However, between 1978 and 1979 a further 206 plaintiffs made claims in the same court against the same defendants (the Tyler 2 actions). Cape and Capasco elected not to defend these actions, maintaining that the Tyler court lacked jurisdiction. They were prepared to let default judgments be entered against them and then to resist attempts at their enforcement in England. In 1983 the Tyler 2 plaintiffs agreed to settle their actions insofar as they were against the United States Government on the

¹⁰⁶ *Adams v Cape Industries Plc* [1990] Ch 433; [1990] 2 WLR 657; [1991] 1 All ER 929 (CA).

¹⁰⁷ The facts are taken from the source *ibid*, at 434-454.

understanding that they would receive default judgments and the Government would then finance their enforcement actions in England. Default judgments were granted on 12 September 1983 pursuant to the United States Federal Rules which provided, *inter alia*, that the pleaded claims were (save in relation to damage) taken to be admitted. No judicial hearing took place. The awards made to individual plaintiffs fell into different monetary bands (67 were awarded \$37,000, 31 \$60,000, 47 \$80,000 and 61 \$120,000). The judge directed that the total award should represent an average award of \$75,000 per plaintiff but it was the plaintiffs' counsel who chose the level of the bands and identified which plaintiffs were to be placed in each band in order to arrive at the directed average award.

In the first instance enforcement proceedings Scott J dismissed the actions for several reasons.¹⁰⁸ The key reason for present purposes was that the procedure adopted by the Tyler 2 court in its default judgment was offensive to the principles of natural justice. This was so because there had been no judicial determination of the defendants' liability and the award of damages had been arbitrary, not based on evidence and not related to the individual entitlements of the various plaintiffs. This ground (among others) was upheld by the Court of Appeal, whose reasoning it is profitable to explore.

At the outset, the Court made the astute observation that:¹⁰⁹

[W]hether any alleged breach of natural justice based on procedural irregularity is such as to render [a] foreign judgment unenforceable, the courts of this country must have regard to *fundamental principles* of justice and not to the letter of the rules which, either in our system, or in the relevant foreign system, are designed to give effect to those principles [emphasis added].

This statement is an almost perfect encapsulation of the submission that the principles of natural justice transcend their particularist domestic expression, and that it is these *principles*, and not their expressions, which are to be applied by domestic courts in enforcement applications. It is also worth noting the Court's

¹⁰⁸ *Ibid*, at 435.

¹⁰⁹ *Ibid*, at 561.

rejection of an argument by the defendant that the principles of natural justice are essentially confined to the hearing rule.¹¹⁰

The Court was moved to find that the Tyler 2 decision was contrary to the principles of natural justice because the methodology pursuant to which damages were calculated was not a judicial one (and was in fact in breach of relevant procedural rules), but rather was characteristic of those used in settlement negotiations:¹¹¹

It seems to us that, in truth, [the Tyler 2 Judge] was applying to the process of assessment of damages in default, *when only the plaintiffs were represented before him*, the process and technique appropriate to a settlement negotiated between both the plaintiffs and defendants with the invention of the judge... The only basis upon which [the Judge could assert that an average of \$75,000 per plaintiff, to be allocated by the plaintiffs' counsel] was a proper figure was that, if the defendants had been present and taking part, they would probably have refused to settle for [a higher figure, but would], in probability, have agreed to pay [the \$75,000 average per plaintiff]... *While damages calculated on an average per plaintiff basis may make very good sense for the purposes of a settlement*, because defendants are not concerned with how the total will be divided up, *a judicial award so calculated is the antithesis of an award based upon the individual entitlements of the respective plaintiffs* [emphasis added].

Moreover, the principles of natural justice afforded the defendants a constructive reasonable expectation that the extent of their liability would be assessed by the judge with respect to evidence in accordance with the applicable procedures.¹¹² That is, the quantum of damages ought to have been determined with respect to the actual circumstances of the plaintiffs, rather than divined by reference to largely hypothetical settlement figures assumed to be acceptable to the defendants.

¹¹⁰ *Ibid*, at 563-564; the argument was based on an imperfect construction of statements in *Jacobson v Frachon* (1928) 138 LT 386 (CA).

¹¹¹ *Ibid*, at 564-567.

¹¹² *Ibid*, at 568. This approach was restated, with approval, in *Joint Stock Company "Aeroflot Russian Airlines" v Berezovsky and Glushkov* [2012] EWHC 3017 at [55].

It is submitted that a number of interesting propositions can be derived from the reasoning in *Adams* case which are relevant to the review of arbitral awards by domestic courts on the grounds of natural justice. The first, as noted above, is that it is the fundamental principles of natural justice, not their particular expressions, which are to be applied. Secondly, natural justice is not confined merely to the hearing rule. And finally, the principles of natural justice require that procedure be of a sufficiently *judicial* character. In this respect, the requirement that decisions be based on appropriate evidence is indispensable.

IV. The Fundamental Issue with the Status Quo

The central issue with the way in which national courts apply natural justice in review of arbitral awards is the tendency for each national jurisdiction to apply its own particular standards and conceptions of natural justice. As an example in the New Zealand context it has been opined that, because of a lack of definition of natural justice in Article 34 of the Model Law, resort must be had to the common law in determining the principles content.¹¹³ The same position has been taken in Australia.¹¹⁴ The problem is particularly severe in jurisdictions which do not have a history of familiarity with international commercial arbitration, and are consequently not immune from “misplaced sentiments of visceral judicial parochialism” in the context of recognition and enforcement.¹¹⁵ This kind of domestic-centric approach is problematic because it is inconsistent with the fundamentally trans-national character of natural justice in the context of international commercial arbitration. It is also inconsistent with the internationalist spirit of the New York Convention and the Model Law. The following paragraphs discuss that spirit, and put forward the suggestion that the domestic-centric

¹¹³ *Methanex Motonui*, above n 1, at [148]-[149].

¹¹⁴ *Castel Electronics*, above n 27, at [56].

¹¹⁵ Michael Hwang and Shaun Lee “Survey of South East Asian Nations on the Application of the New York Convention” in *Journal of International Arbitration* (Kluwer Law International, The Netherlands, 2008) at 892.

approach may be the result of an undesirable conflation of two concepts: due process and public policy.

A. The Internationalist Spirit of the New York Convention and Model Law

At the outset, it should be stressed that the New York Convention represents an instrument of trans-national commercial law.¹¹⁶ Its key advantage is the provision of a “degree of certainty a party can have that an award will be recognised and enforced almost anywhere in the world”.¹¹⁷ Such certainty is undermined by particularist domestic interpretations of natural justice. It is promising, however, that many jurisdictions appear to be moving towards increasingly internationalist interpretations.¹¹⁸

Occasional surprises and disappointments notwithstanding, the [Convention’s] interpretation is encouraging. National courts presented with applications for recognition and enforcement have made progress along a learning curve. In a great number of jurisdictions, courts have adopted the interpretive canon of teleology, that is, the principle that interpretation of a provision should heed the provision’s legislative purposes. In the case of the Convention, the purpose was to favour recognition and enforcement of arbitral awards, that is, *to provide for a predictable outcome* where parties to a business transaction chose this dispute resolution mechanism. Moreover, many judges are aware that, as virtually all modern trans-nation commercial law instruments explicitly provide, “*regard is to be had to its international character and the need to promote uniformity in its application*” [emphasis added].

That a driving force behind the New York Convention (and Articles 34 and 36 of the Model Law by the adoption of materially identical language) was the intention to create internationally consistent criteria for the enforcement and recognition of arbitral awards is evident from its purpose in correcting the perceived failings of the

¹¹⁶ Kronke, Nacimiento, Otto and Port *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Wolters Kluwer, Great Britain, 2010) at 1-2.

¹¹⁷ *Ibid*, at 3.

¹¹⁸ *Ibid*, at 4.

previous 1927 Convention on the Execution of Foreign Arbitral Awards.¹¹⁹ Key among those failings was the fact that the Convention's:¹²⁰

reliance on national laws left the recognition and enforcement of arbitral awards subject to the many differences between national provisions and practices and allowed parties to raise objections to recognition and enforcement on the basis of national idiosyncrasies and forms of procedure that might not reflect prevailing trends.

In a similarly internationalist vein the General Assembly in its recommendation that States give due consideration to adoption of the Model Law spoke of "the desirability of uniformity of the law of arbitral procedures" and the appropriateness of the "establishment of a unified legal framework" in a "model law on arbitration that is acceptable to States with different legal, social and economic systems, [which] contributes to the development of harmonious international economic relations".¹²¹ Moreover, in its 2006 resolution on the revision of the Model Law it was convinced that "the promotion of a uniform interpretation and application of the [New York Convention] is particularly timely".¹²² This view has been taken up by various scholars – it has been observed that the natural justice exception "creates an international substantive rule" and "contains standard and uniform requirements".¹²³

B. The Development of Parochialism

¹¹⁹ Convention on the Execution of Foreign Arbitral Awards 92 LNTS 302 (1929-30).

¹²⁰ Emmanuel Gaillard and Domenico Di Pietro *Enforcement of Arbitral Agreements and International Arbitral Awards* (Cameron May, Great Britain, 2008) at 8.

¹²¹ General Assembly, *Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law*, A/Res/40/72 (40th Session, 1985).

¹²² General Assembly, *Revised Articles on the Model Law on International Commercial Arbitration of the United Nations Trade Commission on International Trade Law*, A/Res/61/33 (2006).

¹²³ Fouchard, Gaillard and Goldman *Traité de l'Arbitrage Commercial International* (Litec, Paris, 1996) at [1696]. There is an update and English translation of this text comprised by: Fouchard, Gaillard and Savage (Ed) *Fouchard Gaillard and Goldman on International Commercial Arbitration* (Kluwer Law International, The Hague, 1996); Poudret and Besson *Comparative Law of International Arbitration* (2nd ed, Sweet & Maxwell, London, 2006) at [910].

It is now appropriate to examine a key reason why, despite the trans-national origins of natural justice and the internationalist aspirations of the New York Convention and Model Law, a domestic-centric approach to its application in review of arbitral awards by national courts is prevalent. It is suggested that an undesirable conflation exists between the concept of procedural fairness and the concept of public policy. It will be recalled that under Article V(1)(b) of the Convention (which is regarded as the “due process exception”)¹²⁴ an award may be refused recognition and enforcement where a party was not given notice of the arbitration or was otherwise unable to present its case; while under Article V(2)(b) recognition and enforcement may be refused where the award is contrary to the public policy of the state in which enforcement is sought. Similar provisions are included in the Model Law. It is often the case that a party in an enforcement application will raise both grounds in relation to an alleged breach of procedural fairness.¹²⁵ This is widely countenanced by national courts in that a breach of procedural fairness may be contrary to that state’s public policy.¹²⁶ In the cases of Australia and New Zealand, specific additions to the Model Law have been made which render *any* breach of natural justice *ipso facto* contrary to those countries’ public policy.¹²⁷

It is submitted, however, that the conflation of these concepts is unnecessary, undesirable and inefficient. In the first place, it adds nothing to the due process grounds for refusal of recognition and enforcement which already exist in the New York Convention and Model Law. Because the broad right to present one’s case is already safeguarded, the only reasonable justification for refusing recognition and enforcement because of a breach of natural justice, *via* the public policy ground, is if the existing due process protections are insufficient to ensure procedural fairness. That is, there must be some aspect of natural justice which is *not* covered by the existing protections, such that recourse to the public policy exception is necessary.

¹²⁴ Kronke, above n 116, at 233.

¹²⁵ Kronke, above n 116, at 235

¹²⁶ *Ibid.*

¹²⁷ Arbitration Act 2006 (NZ) ss 34(6)(b) and 36(3)(b); and International Arbitration Act 1974 (Cth) s 19(b).

The strongest candidate for this aspect is the rule against bias, the other fundamental aspect of natural justice. It is submitted, however, that the rule against bias is in fact included in the non-public policy grounds. This is so in two ways. The first is that, as will be recalled, the principle that each party must have the opportunity to present its case includes that case being given proper and fair consideration. An adjudicator who is not impartial cannot give a proper and fair consideration to a party's case. Therefore, the hearing rule includes the rule against bias. Alternatively, Articles V(1)(d) of the New York Convention and 36(1)(iv) of the Model Law provide that an award may be refused recognition and enforcement on the ground that "...the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place". Article 34(2)(iv) of the Model Law allows for the setting aside of an award on materially similar grounds. It is reasonable to assume that the rule against bias would be included in the arbitration agreement, expressly or as an implied term. Failing that, it would surely part of the *lex loci arbitri*.

The negative effects of including due process in public policy are manifold. The public policy exception is explicitly designed to bring domestic and particularist concerns to the fore at the enforcement stage: Article V(2)(b) of the Convention provides that recognition and enforcement may be refused if such would be "contrary to the public policy of that country". This is consistent with other references to "that country" in which recognition and enforcement is sought. It is in contrast to the grounds in Article V(1) which contain no analogous references to the particular standards of the country where enforcement is sought. Including natural justice in the public policy exception opens the way for the domestication of natural justice in a manner which is not justified on the original language and context of the New York Convention and Model Law. Moreover, where due process forms part of public policy, the number of claims appearing under the public policy ground is multiplied.¹²⁸ As it was famously put by Borrough J in *Richardson v Melish*:¹²⁹

¹²⁸ See: Kronke, above n 116.

¹²⁹ *Richardson v Melish* (1824) 2 Bing 252.

I, for one, protest, as my Lord has done, against arguing too strongly upon public policy;- it is a very unruly horse, and when once you get astride it you never know where it will carry you.

Because of the ambiguity inherent in the concept, claimants tend to rely on it as a “fall-back” claim. The profusion of such claims can only contribute to the inefficiencies, delays and costs associated with the judicial process. It is therefore sensible to restrict the content of the public policy exception as much as is reasonable. Moreover, including natural justice within the public policy exception can only intensify the risks referred to in *Parsons & Whittlemore v Societe Generale* that the domestic courts of one State may use the exception to improperly refuse recognition and enforcement of awards rendered in another State.¹³⁰ The inclusion of natural justice in the public policy ground in the recognition and enforcement context serves no real purpose and is undesirable.

If, however, the conflation of natural justice and public policy is insisted upon, it is submitted that, in order for a breach of the former to constitute a breach of the latter, that former breach should be of internationalised rather than particularist standards. This is not utterly alien to the current practice of a number of states who, in the recognition and enforcement context, consider the “public policy” referred to in Article V(2)(b) of the New York Convention to be their “international public policy” rather than their domestic one.¹³¹

V. The Solution: Natural Justice Internationalised

It is useful at this point to give a brief summary of the position thus far reached. The above examination of the theoretical foundations of arbitration has provided a theory which considers the system to be of a supra- or trans-national nature. Certain policy considerations have been explored, the most important of which for present purposes is the desirability of international consistency in international commercial arbitration. Consideration of the legal sources of natural justice has revealed those to

¹³⁰ See: III(B)(1) of this paper.

¹³¹ See: Kronke, above n 116.

lie in general principles of law common to civilised nations. These principles have been codified in international instruments like the New York Convention and the Model Law. This has been done in an internationalist spirit. In light of all this, it is appropriate that the principles of natural law as they apply in the context of international arbitration should be internationalised, and national courts in review of awards should respect, uphold and further this internationalisation.

A. The Precedent of Human Rights Law

It is submitted that this kind of internationalisation of fundamental principles has analogous precedent in the context of human rights law. Human rights are said to be applicable universally.¹³² As such, their content is trans-national and should be given equal effect irrespective of the particular jurisdiction in which their vindication is sought. There is no room for particularist opinions as to what constitutes a human right (at least in the broad sense of the words). It is submitted that the principles of natural justice share in this universal applicability because of their universal nature, and, *a fortiori*, because a party's entitlement thereto is itself a human right. As the Universal Declaration makes clear:¹³³

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

While minor modifications may be made to this statement to suit the arbitral context – a “public hearing” is not required – the principles it enshrines apply to any determination of a party's rights and obligations by an adjudicatory body.

In addition to the Universal Declaration, there are many other affirmations of natural justice as a universal human right. A significant one of these is the European Convention on Human Rights. Article 6(1) of that convention relevantly provides that: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a

¹³² See: *Universal Declaration of Human Rights* GA Res A/217/III (1948).

¹³³ *Ibid*, art 10.

reasonable time by an independent and impartial tribunal established by law”.¹³⁴ A survey of authorities on the applicability of the European Convention in the arbitral context will show how, in the human rights context, natural justice may be applied in a consistent way across various jurisdictions. While the Convention’s text and *travaux préparatoires* make no mention explicit of its applicability to arbitration,¹³⁵ the position is as follows. *Prima facie*, “everyone” is entitled to the protection of Article 6(1) in the determination of his or her civil rights and obligations, which may be done by arbitration.¹³⁶ While some scholars argue that a party’s entering into an agreement to arbitrate constitutes a waiver of its rights under Article 6(1),¹³⁷ the better view is that:¹³⁸

It cannot be deduced from the mere choice of having a dispute settled by consensual arbitration instead of by a national court that the application of the [European Convention] is wholly excluded. The right to a fair trial is part of all democratic countries and as a concept ranks to the level of international public policy.

The content of this right includes the hearing rule and the rule against bias. The former requires that a party be able to present its case, challenge that against it and to be represented by counsel, though the precise application of the rule will vary according to the facts of particular cases.¹³⁹ The latter rule is applied with a subjective-objective test: the adjudicator must be actually (subjectively) impartial, as well as objectively impartial.¹⁴⁰ Because the Convention is primarily concerned with the actions of States, Article 6(1) is not directly applicable to arbitrators and awards

¹³⁴ Council of Europe *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos 11 and 14 (4 November 1950) ETS 5, art 6(1).

¹³⁵ Besson, Hottelier and Werro (Ed) *Human Rights at the Centre* (Schulthess, Switzerland, 2006) at 74.

¹³⁶ *Ibid*, at 77. See also: *Axelsson v Sweden* Application No 11960/86 (13 July 1990) 86 ECHR Dec Rep 99.

¹³⁷ See for example: Ernest Krings and Lambert Matray “Le Juge et l’Arbitre” (1982) 59 Rev Dr Int et Dr Comp 227 at 254.

¹³⁸ *Human Rights at the Centre*, above n 135, at 82-83.

¹³⁹ *Ibid*, at 86-87.

¹⁴⁰ *Ibid*, at 88; *Piersack v Belgium* (1 October 1982) ECHR A/53.

cannot be directly challenged in the European Court of Human Rights.¹⁴¹ However:¹⁴²

A certain degree of State supervision [of the arbitration process] (through the setting up of an effective award annulment procedure) is required under article 6(1) [of the Convention] as to those very fundamental rights that cannot be waived... Such violation of a duty to provide for effective annulment proceedings securing the preservation of fundamental due process guarantees, stemming from article 6(1), is the area where States' liability can be asserted.

For present purposes, the significance of this regime is that States party to the Convention are required to establish annulment procedures which ensure the observance of the fundamental rules of natural justice. That is, natural justice *qua* a human right, existing on a trans-national level, is so essential to the operation of adjudicative processes that it compels the conformity of particular legal systems to its requirements. This lends support to the argument that the principles natural justice exists on a supra-national level, and should be interpreted and applied domestically as such.

B. Drawing the Threads Together: Natural Justice in International Arbitration

It is appropriate at this point to draw certain conclusions in light of the foregoing discussion. It will be recalled that the core aspects of international arbitration are its essentially private and contractual nature. Four theoretical conceptions of arbitration have been discussed, the most effective of which for present purposes is Gaillard's trans-national approach. Normative considerations pertaining to the integrity of the arbitral system, the finality of awards, the autonomy of the system and the need for international consistency have been canvassed. It is hoped that a case has been made for the application of natural justice in the review of arbitral awards by national courts should be internationalised, being derived from general principles of law. The core aspects of natural justice are the rights to impartial treatment and to be heard. It is submitted that the success of international commercial arbitration (and therefore

¹⁴¹ *Human Rights at the Centre*, above n 135, at 91.

¹⁴² *Ibid*, at 93.

its future) lies in its universality and high degree of independence from the peculiarities of national legal systems, effected largely by (at least in the setting aside and recognition and enforcement context) the New York Convention and the UNCITRAL Model Law: “indeed, the popularity of arbitration as a means of resolving trans-national commercial disputes is in no small measure attributable to the conclusion and subsequent wide acceptance of [the Convention]”.¹⁴³ The significance and central importance of the Convention and Model Law in international commercial arbitration “makes it even more important that the Convention is interpreted *uniformly* by the courts [emphasis in original].¹⁴⁴

In practice, there are two ways in which this may be achieved. The first concerns the development of a Protocol which clarifies the meaning of the Convention in a way which domestic courts may adopt. This approach was in fact suggested to UNCITRAL in 1976, though it was rejected.¹⁴⁵ Though the rejection “[m]ay be questioned”, there are practical problems associated with the development of a Protocol of this kind – it may take considerable time before all parties to the Convention become parties to the Protocol, and some parties to the former may deem adoption of the latter unnecessary, resulting in a confused international legal regime.¹⁴⁶ The second way in which a uniform interpretation may be achieved is by the analysis of the Convention in light of the rules of treaty interpretation and the comparison of consistent case law across Contracting States.¹⁴⁷ It is this approach which is preferred. Because the New York Convention is a treaty, and the Model Law in relevant part largely follows the Convention, the foundational interpretation of the natural justice ground for setting aside and refusal of recognition and enforcement should flow from the general provisions of the Vienna Convention on

¹⁴³ *The Conflict of Laws*, above n 71, at 873.

¹⁴⁴ *New York Arbitration Convention of 1985*, above n 70, at 1.

¹⁴⁵ *Ibid*, at 2.

¹⁴⁶ *Ibid*.

¹⁴⁷ *Ibid*.

the Law of Treaties.¹⁴⁸ The most important of these provide that treaties must be interpreted in good faith, in accordance with their ordinary meaning and in light of their text, object and purpose, as well as with reference to *travaux préparatoires* where appropriate.¹⁴⁹ There is cause to be enthusiastic about this possibility. Poudret and Besson's comparative study of fundamental principles of procedure applicable in international arbitration found that while they may be "express[ed] in [domestic] laws using a varied terminology... there are no major divergences between the various legal orders except in a few points".¹⁵⁰ At the very least, the most basic elements of natural justice are present.¹⁵¹ Given at least some extant level of agreement as to the significance and content of natural justice across domestic jurisdictions, the full internationalisation of those principles should not be seen as radical.

C. Concluding Remarks

International commercial arbitration is a significant dispute resolution mechanism for international economic actors. It operates on the international plane. While one of its key advantages is its flexibility and amenability to parties' agreement as to its procedure, it must and does retain some mandatory standards of natural justice. In the setting aside and recognition and enforcement context, it is the courts of national jurisdictions to which the responsibility of enforcing these standards falls. It is well in keeping with the trend of increasing inter-connectedness and inter-dependence of global economic activity that these standards be supra- or trans-national standards. It should not come as a surprise to domestic judicial bodies to be called upon to

¹⁴⁸ Vienna Convention on the Law of Treaties (27 January 1980) 1155 UNTS 331. A point of clarification on the present applicability of the Vienna Convention must be made. As Van Den Berg notes, the Convention has not been adopted by all States, and that it applies only to Treaties concluded subsequent to its adoption (art 4). However, he correctly observes that the Convention represents a codification of international case law, custom and legal doctrine. *New York Arbitration Convention of 1985*, above n 70, at 3.

¹⁴⁹ Vienna Convention, above n 148, arts 31 and 32.

¹⁵⁰ *Human Rights at the Centre*, above n 135, at [547].

¹⁵¹ *Ibid.*

embrace an internationalist spirit when it comes to natural justice in arbitration given the origin of that justice in trans-national instruments, general principles of law and ultimately, natural law itself. It is hoped that the internationalisation of natural justice principles will contribute to the development of a legal environment of which we may truthfully say: "on the whole, in the tug-of-war between parochialism and internationalism, internationalism has won."¹⁵²

¹⁵² Kronke, above n 166, at 5.

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