KASTOM – A PUBLIC POLICY EXCEPTION UNDER THE NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

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Abstract

*Despite the enormous success of the New York Convention, the Pacific Island countries ["**PICs**"] are a blank spot on the New York Convention map. Any effort to promote international arbitration law reform in the PICs has to be sensitive to their exciting legal frameworks to be successful. The PICs are plural legal systems in which 'kastom' provides a set of norms often equal to positive laws. An obstacle on the PICs' way to become part of the international arbitration community are fears that their 'custom' or 'kastom' may be left aside or overridden by the overseas legal principles and paradigms. The paper discusses if and to what extent the PICs' 'kastom' may qualify as 'public policy' under Article V(2)(b) of the New York Convention, thereby allowing Pacific Island states to deny the recognition and enforcement of foreign arbitral awards which they deem fundamentally contrary to their 'kastom'.*

I. Introduction

The UNCITRAL Model Law on International Commercial Arbitration ["**Model Law**"][1] and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"][2] are both tremendously successful international instruments: as of June 2018, legislations based on the Model Law have been adopted in 80 States in a total of 111 jurisdictions.[3] Likewise, 159 countries are parties to the New York Convention.[4] Some parts of the world have nevertheless remained blank spots on the international arbitration map. This is particularly true of the Pacific Island countries ["**PICs**"] where a vast majority of States have neither adopted the Model Law nor acceded to the New York Convention.[5] To promote international arbitration reform in the South Pacific, the Asian Development Bank ["**ADB**"] and UNCITRAL, through its Regional Centre for Asia and the Pacific, have joined forces in a broad

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1 United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, 1985, with amendments as adopted in 2006, G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 4, 2006) [*hereinafter* "UNCITRAL Model Law"].

2 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 6, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

3 *See Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

4 *See Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

5 *See* Allison Ross, *Fiji passes new law*, 12 GLOBAL ARB. REV. 1, 7 (2017).

technical assistance project.[6] According to its mission statement, the project aims to catalyse the establishment of one single and effective commercial dispute resolution regime through international arbitration reform, in order to boost international investor confidence in the ADB's developing member countries of the South Pacific.[7]

One significant outcome of the project was celebrated last year: on September 15, 2017, the Parliament of the Republic of Fiji passed the 'International Arbitration Act, 2017'.[8] The legislation enacts a comprehensive, state-of-the art framework for international arbitration based on the Model Law.[9] The act implements the New York Convention which Fiji ratified on September 27, 2010.[10] It also incorporates various best practices in international commercial arbitration, including provisions adapted from the Australia International Arbitration Act, the Hong Kong Arbitration Ordinance and the Singapore International Arbitration Act.[11] The ADB and the UNCITRAL Regional Centre for Asia, and the Pacific as well as the prominent international arbitration practitioners who were involved in the project[12] did pioneering work – the Fiji International Arbitration Act, 2017 has the potential to serve as a template for future legislation in other countries of the South Pacific region.

An obstacle on the PICs' way to become part of the international arbitration community are fears that their 'custom' or 'kastom'[13] may be left aside or overridden by the overseas legal principles and paradigms.[14] It is the purpose of this paper to examine whether these fears are well-founded. Trying to recap the multifaceted manifestations of 'kastom' in one concise definition is a very difficult exercise. In general terms, 'kastom' is a mode of behaviour or procedure which is widely practised and accepted (and typically long established) in a particular society or community.[15] In 2015, the Parliament of Samoa enacted the following definition of "*customs*" to be used in the interpretation of Samoan legislation:

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6 *See Promotion of International Arbitration Reform for Better Investment Climate in the South Pacific*: *Technical Assistance Report*, ASIAN DEVELOPMENT BANK (Nov. 2016), *available at* https://www.adb.org/projects/documents/promotion-international-arbitration-reform-for-better-investment-climate-south-pacific-tar.

7 *See Regional: Promotion of International Arbitration Reform for Better Investment Climate in the South Pacific (Overview)*, ASIAN DEVELOPMENT BANK, *available at* https://www.adb.org/projects/50114-001/main#project-overview.

8 The International Arbitration Act 2017 (Act No. 44 of 2017) (Fiji), *available at* http://www.parliament.gov.fj/acts [*hereinafter* "The International Arbitration Act 2017"].

9 *See International Arbitration Group Assists Fiji in Adoption of UNCITRAL Model Law on International Commercial Arbitration*, WILMER CUTLER PICKERING HALE AND DORR LLP (Sept. 25, 2017), *available at* https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/WH_Publications/Client_Alert_PDfs/2017-09-25-international-arbitration-group-assists-fiji-in-adoption-of-uncitral-model-law-on-international-commercial-arbitration.pdf [*hereinafter* "Wilmer Hale"].

10 *See Fiji has ratified the 1958 Convention on the Recognition of Foreign Arbitral Awards*, MUNRO LEYS LAWYERS (Oct. 15, 2010), *available at* http://www.munroleyslaw.com/new-york-convention-international.

11 Wilmer Hale, *supra* note 9.

12 Gary Born and Jonathan Lim of Wilmer Cutler Pickering Hale and Dorr as well as Sydney-based Daniel Meltz of 12 Wentworth Selborne Chambers provided their support as advisers of the Asian Development Bank; *see* Ross, *supra* note 5.

13 For the purposes of this paper, reference will be made to 'kustom' rather than 'custom' if at all possible as 'kustom' is a technical anthropological term (sometimes also spelled 'kastom'); *see* NICHOLAS A. BAINTON, THE LIHIR DESTINY: CULTURAL RESPONSES TO MINING IN MELANESIA 73 (2010).

14 A fear that might not be unfounded, *cf.,* Mary Ayad, *Harmonization of Custom, General Principles of Law, and Islamic Law in Oil Concessions*, 29 J. INT'L ARB. 518 (2012) (who discusses the disregard of custom in the MENA region and the ensuing issues).

15 *Cf.*, entry "custom" A. 1. a., OXFORD ENGLISH DICTIONARY, *available at* http://www.oed.com.

> "*the customs, usages and traditional practices of the Samoan people existing in relation to the matter in question at the time when the matter arises, regardless of whether or not the custom, usage or practice has existed from time immemorial.*" [16]

The importance of 'kastom' for the societies of the PICs is not to be underestimated; as part of the legacy of the colonial era, the Pacific Islands today have to accommodate one or more forms of colonial law alongside the customary law of their people. They are confronted with plural legal systems, comprising laws and legal institutions from both the overseas and the customary legal system; therefore, the current state of the legal systems in the PICs has been described as 'legal pluralism'.[17] Attempts to reconcile the European settlers' imported institutional models with the indigenous populations' 'kastom' and traditions in a unique 'Pacific Way' has been and continues to be identity-generating for the societies in the South Pacific.[18] The PICs' embrace of international arbitration has to be understood against this social and cultural background. The paper discusses if and to what extent the PICs' 'kastom' may qualify as '*public policy*' under Article V(2)(b) of the New York Convention, thereby allowing Pacific Island States to deny the recognition and enforcement of foreign arbitral awards which they deem fundamentally contrary to their 'kastom'.

II. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

In order to address the potential significance of 'kastom' for the recognition and enforcement of foreign arbitral awards in the PICs, the current state of play regarding the New York Convention has to be ascertained. Therefore, in the following sections the paper will outline briefly the structure and purpose of the New York Convention, focussing on the public policy exception laid down in Article V(2)(b) of the New York Convention.

A. The Presumptive Obligation to Recognise Foreign Arbitral Awards, Article III of the New York Convention

In the often cited words of the United States Court of Appeals (11th circuit),

> "*[t]he purpose of the New York Convention […] is to 'encourage the recognition and enforcement of international arbitral awards', to 'relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that [is] speedier and less costly than litigation*".[19]

The principal regulation of the New York Convention is Article III which stipulates that each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. Article III embodies the pro-enforcement policy of the New York

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16 The Acts Interpretation Act 2015, §3(1), (Samoa), *available at* http://www.palemene.ws/new/parliament-business/acts-regulations/acts-2015.

17 *See* TELEILAI LALOTOA MULITALO ROPINISONE SILIPA SEUMANUTAFA, LAW REFORM IN PLURAL SOCIETIES: THE WORLD OF SMALL STATES 26 (Petra Butler & Caroline Morris eds., 2018).

18 *See* EMMANUEL-PIE GUISELIN & MARC JOYAU, ETATS ET CONSTITUTIONS DU PACIFIQUE SUD [STATES AND CONSTITUTIONS OF THE SOUTH PACIFIC] 7 (2010).

19 *See* Industrial Risk Insurers v. MAN Gutehoffnungshütte GmbH, 141 F.3d 1434, 1440 (1998) relying on Bergesen v. Joseph Muller Corp 710 F.2d 928, 932 (2d Cir., 1983) and Ultracashmere House, Ltd. v. Meyer, 664 F.2d 1176, 1179 (11th Cir. 1981).

Convention and sets forth the general principle that foreign arbitral awards are entitled to a *prima facie* right to recognition and enforcement in the Contracting States.[20] The Contracting States have a presumptive obligation to recognise and enforce international arbitral awards subject only to the limitations which are expressly regulated in the Convention.[21] The New York Convention's fundamental objective is to facilitate the recognition and enforcement of foreign awards by adopting uniform international standards, thereby preventing national courts from imposing unduly complicated or onerous procedural hurdles at the recognition and enforcement stage.[22]

B. The Public Policy Exception, Article V(2)(b) of the New York Convention

One of the grounds for refusing to recognise and enforce an international arbitral award, which is often invoked, but rarely granted is the public policy exception laid down in Article V(2)(b) of the New York Convention.[23] Article V(2)(b) of the New York Convention establishes that recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought, finds that the recognition or enforcement of the award would be contrary to the *public policy of that country* (emphasis added). Although academic discussion has put the public policy exception at centre stage, its contents remain highly controversial in numerous respects.[24] In the famous and often cited judgment of *Richardson* v. *Mellish,*[25] it was held that "*[p]ublic policy […] is a very unruly horse, and when once you get astride it you never know where it will carry you.*".

However, there is considerable consensus on some aspects of the public policy exception. First and foremost, it is undisputed that the spirit and purpose of the public policy exception is to protect the fundamental, mandatory policies of the Contracting States' national legal regimes.[26] As Reinmar Wolff illustratively put it,[27] "*[p]ublic policy serves the purpose of providing the Contracting States with a safety-valve allowing them to prevent the intrusion of awards into their legal system which they consider irreconcilable with it.*".

The crucial significance of public policy for the Contracting States also explains why it is the only ground – apart from non-arbitrability as laid down in Article V(2)(a) of the New York Convention – under which the court can refuse recognition and enforcement on its own motion.[28] In regard to the structure of Article V of the New York Convention, this is the main difference between the grounds for refusing to recognise an award enumerated in both of its paragraphs:[29] the exceptions laid down in Article V(1) of the New York Convention must be

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20 *See* UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 77, G.A. Res. 62/65, U.N. Doc. A/RES/62/65 (Dec. 6, 2007) (United Nations Publications, Vienna, 2016 ed.) [*hereinafter* "UNCITRAL Secretariat Guide"].

21 *See* GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3410 (Alphen aan den Rijn ed., 2d ed. 2014).

22 UNCITRAL Secretariat Guide, *supra* note 20.

23 *See* REINMAR WOLFF, NEW YORK CONVENTION – CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS OF 10 JUNE 1958 – COMMENTARY 489 (C. H. Beck ed., 2012).

24 *See* BORN, *supra* note 21, at 3647.

25 *See* Richardson v. Mellish, [1824] All E.R. 258, 266 (Eng.).

26 *See* BORN, *supra* note 21, at 3648.

27 *See* WOLFF, *supra* note 23, at 490.

28 *Id.*

29 *See* UNCITRAL Secretariat Guide, *supra* note 20, at 258.

raised by the party opposing recognition of the award whereas the exceptions laid down in Article V(2) of the New York Convention can be raised *sua sponte* by the relevant national court.[30] As the Swiss Federal Tribunal held, [31] "*[j]udges can invoke ex officio both recognition refusal grounds enumerated in Article V(2)*".

There is also a broad consensus that the general 'pro-enforcement' orientation of the New York Convention points to a narrow reading of the public policy exception. Research conducted by UNCITRAL reveals that most courts ascribe a narrow interpretation to public policy.[32] The commentary on the Convention is to the same effect.[33] With due regard to the structure of Article V as an exception to the general 'pro-enforcement' principle embodied in Article III of the New York Convention, the view that public policy has to be interpreted restrictively is imperative.[34]

i. Contracting States' sovereignty over defining public policy

One issue which is still not completely resolved regarding Article V(2)(b) of the New York Convention is the determination of the law which governs the public policy exception. There is ample case law and literature on the question of whether public policy refers to domestic public policy or to a more international concept.[35] For the purposes of this paper, it suffices to state that the overwhelming weight of national court authority in both common law and civil law jurisdictions applies the public policies of the local judicial enforcement forum.[36] Academic opinion widely agrees.[37] In particular, the authors endorse Reinmar Wolff's methodological stance that the Contracting States are sovereign to define their public policy for the purposes of Article V(2)(b) of the New York Convention:[38]

> "*The public policy standard under Article V(2)(b) is defined under the respective national law; as a starting point, the Contracting States are entitled to determine the contents of their public policy through their legislation and judiciary.*"

A plethora of arguments supports the view that Article V(2)(b) of the New York Convention mainly refers to national standards of public policy.

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30 *See* JENS ADOLPHSEN, MÜNCHENER KOMMENTAR ZUR ZPO 66 (Thomas Rauscher et. al. eds., 5th ed. 2017); *see also*, BORN, *supra* note 21, at 3652; *see also*, PATRICIA NACIMIENTO, RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 207 (Herbert Kronke et al. eds., 2010).

31 *See* Tribunale fédérale [TF], July 28, 2010, XXXVI Y.B. COMM. ARB. 337, ¶ 16 (Switz.) [*hereinafter* "Tribunale Federale"].

32 *See* UNCITRAL Secretariat Guide*, supra* note 20, at 248. For a comprehensive overview of national court authority, *see also,* BORN, *supra* note 21, at 3653.

33 *See* DIRK OTTO & OMAIA ELWAN, *Article V(2)*, *in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 367 (Herbert Kronke et al. eds., 2010); *see also,* WOLFF, *supra* note 23, at 512.

34 *See*, Tribunale Federale, *supra* note 31 at ¶ 19 ("[b]eing an exception, the public policy reservation is to be interpreted restrictively.").

35 For an extensive overview of court authority and academic literature on the topic, *see* OTTO & ELWAN, *supra* note 33, at 366.

36 *See* BORN, *supra* note 21, at 3653.

37 *See* UNCITRAL Secretariat Guide*, supra* note 20, at 243; *see also*, WOLFF, *supra* note 23, at 494, 499, 514.

38 *See* WOLFF, *supra* note 23, at 494.

As a textual matter, Article V(2)(b) permits non-recognition where giving effect to an award is "*contrary to the public policy of that country*" (emphasis added), that is, the country where recognition is sought.[39] In other words, Article V(2)(b) explicitly stipulates the law of the country where recognition and enforcement is sought as governing the public policy.[40]

The structure of Article V(2) of the New York Convention cannot be reconciled with a requirement that Contracting States apply purely transnational or '*truly international*' public policy. Article V(2)(b) allows Contracting States to rely on local law rather than uniform international standards – which, by contrast, are referred to in Article V(1) – to deny the recognition of an otherwise enforceable award.[41]

Article 36(1)(b)(ii) of the Model Law, in light of Article V(2) of the New York Convention, also endorses the view that the public policy exception is principally governed by the domestic law of the recognition court. Like Article V(2)(b) of the New York Convention, Article 36(1)(b)(ii) of the Model Law explicitly references the domestic public policy of the country in which recognition or enforcement is sought. It reads:

> "*(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:*
> *[…]*
> *(b) if the court finds that:*
> *[…]*
> *(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.*" (emphasis added).[42]

Finally, the purpose of Article V(2)(b) of the New York Convention as a safeguard or 'safety-valve mechanism'[43] for the Contracting States' most fundamental notions of justice requires that they have the authority to determine what their public policy actually consists of. It has to be borne in mind that the public policy exception is a common element in a majority of similar conventions[44] and can therefore be seen as an important contributor to the enormous success of the New York Convention. It is most unlikely that the convention would have had the success it has had if Contracting States had been denied the possibility of the non-recognition and non-enforcement due to their public policy concerns.[45]

However, the Contracting States' sovereignty over defining public policy is not without limitations. The ambit of the public policy exception would be overly expanded if a Contracting State regarded each and every violation of its domestic substantive laws or procedural rules as

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39 *See* BORN, *supra* note 21, at 3658.
40 *See* WOLFF, *supra* note 23, at 493.
41 *See* BORN, *supra* note 21, § 26.05 [C], at 3647, 3658; *see also*, REINMAR WOLFF, *supra* note 23, at 481.
42 UNCITRAL Model Law, *supra* note 1.
43 *See* WOLFF, *supra* note 23, at 490.
44 *See* Pierre Mayer & Audley Sheppard, *Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19 ARB. INT'L 249, 251 (2003) (numerous examples of public policy exception provisions in other international conventions).
45 *See* WOLFF, *supra* note 23, at 490.

contravening its public policy.[46] Rather, only those national public policies which protect a state's most basic notions of morality and justice,[47] and which mandatorily demand application to international matters constitute public policy for the purposes of Article V(2)(b) of the New York Convention.[48] As the Hong Kong Court of Final Appeal convincingly stated, the public policy exception refers to

> "*those elements of a State's own public policy which are so fundamental to its notions of justice that its courts feel obliged to apply the same not only to purely internal matters but even to matters with a foreign element by which other states are affected.*".[49]

In addition to this 'upper limitation' of the Contracting States' leeway to define their public policy, Article V(2)(b) of the New York Convention also entails the obligation not to fall below a minimum level of content ('lower limitation').[50] Most importantly, the Contracting States have to respect their obligations towards other states or international organisations as they are legally bound and thus not free to determine the contents of their national public policies in this respect.[51] These limitations still leave the Contracting States with much leeway to shape their national public policies and to deny recognition and enforcement of foreign arbitral awards based on Article V(2)(b) of the New York Convention.[52]

ii. Aspects of public policy according to the international law association

After the law governing the public policy exception has been determined, it has to be examined how the public policy standard can actually be established. As a rule of thumb, it can be said that all policies or values which are articulated in constitutional, legislative or judicial instruments can be regarded as public policies for the purposes of Article V(2)(b) of the New York Convention.[53] In 2002, the International Law Association ["**ILA**"] Committee on International Commercial Arbitration agreed upon and published a number of recommendations as to the application of the public policy exception by the Contracting States' courts. Inter alia, the recommendations include what can be identified as parts of public policy:

> "*The international public policy of any State includes:*
>
> *(i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned;*

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46 *See* BORN, *supra* note 21, at 3662; *see also,* WOLFF, *supra* note 23, at 504.

47 Parsons And Whittemore Overseas Co. Inc. v. Société Générale de l'Industrie du Papier (RAKTA) and Bank of America, 508 F. 2d 969, ¶ 9 (2nd Cir. 1974) [*hereinafter* "Parsons And Whittemore Overseas Co. Inc. Case"] (Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum State's most basic notions of morality and justice); *See also*, STEFAN KRÖLL, THE PUBLIC POLICY DEFENSE IN THE MODEL LAW JURISPRUDENCE- THE ILA REPORT REVISITED 139 (Fabien Gélinas et. al. eds., 2013).

48 *See* BORN, *supra* note 21, at 3659.

49 *See* Hebei Import And Export Corp. v. Polytek Engineering Co. Ltd., [1999] 2 HKC 205 (C.F.A.) (H.K.); [1999] XXIVa Y.B. Comm. Arb. 652, 676 (C.F.A.) (H.K.); *see also* Parsons And Whittemore Overseas Co. Inc. Case, 508 F. 2d 969, ¶ 9 (2nd Cir. 1974).

50 *See* WOLFF, *supra* note 23, at 506.

51 *See Id.* at 506.

52 *See Id.* at 507.

53 *Cf.* BORN, *supra* note 21, at 3665.

(ii) rules designed to serve the essential political, social or economic interests of the State, these being known as 'lois de police' or 'public policy rules'; and

(iii) *the duty of the State to respect its obligations towards other States or international organisations.*".[54]

Whether the ILA recommendations exhaustively cover all aspects of public policy is a question which does not need to be addressed for the purposes of this paper. Academics have convincingly used the three categories defined by the ILA as a basis to examine the substantive public policy under Article V(2)(b) of the New York Convention.[55] It is therefore indisputable that the ILA recommendations can serve as a starting point for the discussion whether or not 'kastom' may qualify as public policy under the New York Convention.

III. 'Kastom' as Part of the Pacific Islands' Fundamental Notions of Morality and Justice

Based on the premises outlined above, it is the thesis of this paper that 'kastom' is a source of the Pacific Islands' fundamental notions of morality and justice and can thus be regarded as a source for 'public policy' for the purposes of Article V(2)(b) of the New York Convention. The following section of this paper will unfold numerous different angles and perspectives on 'kastom' in order to prove the authors' point.[56] The paper will first address whether 'kastom' meets the threshold for providing a source for the public policy exception under the New York Convention and then the criteria a rule of 'kastom' has to meet to be considered 'public policy' under Article V(2)(b) of the New York Convention.

A. 'Kastom' as a Source of Law

i. The recognition of 'kastom' as a source of law

An argument that might be made against the recognition of 'kastom' as public policy, is that it does not even qualify as law in the first place. The core of the problem lies in the two-fold nature of 'kastom'. As Jennifer Corrin and Don Paterson observe:

> "*On one hand, custom can be merely a practice or usage, that is, what is actually done by people. On the other hand, it can also be a practice or usage that is required to be done. The practice or usage becomes a rule of law, and people will be penalised for failing to observe that custom.*".[57]

The question whether or not 'kastom' can be classified as law is a sensitive one: there is a strong judicial stereotype that 'kastom' is less certain, less believable and thus less 'law' than the laws and legal systems imported to the PICs by the colonists.[58] The question has to be addressed with a great degree of observance to the complexities and conflicts which arise in plural legal systems such as the Pacific Islands.

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54 *See* Mayer & Sheppard, *supra* note 44, at 255.

55 *Cf.* WOLFF, *supra* note 23, at 559.

56 It is beyond the scope of this paper to examine analogies between 'kastom' and legal paradigms such as lex mercatoria, usage, commercial custom, and the treatment of custom within investment arbitration.

57 *See* JENNIFER CORRIN & DON PATERSON, INTRODUCTION TO SOUTH PACIFIC LAW 51 (4th ed. 2017).

58 *See* JEAN G. ZORN & JENNIFER CORRIN CARE, PROVING CUSTOMARY LAW IN THE COMMON LAW COURTS OF THE SOUTH PACIFIC 2 (2002).

ii. Recognition by the people of the Pacific

As a starting point, it is very important to understand that in PICs kastom is 'law'.[59] The New Zealand Law Commission noted:[60]

> "*It is apparent that the clear majority of disputes in many Pacific countries, especially in Melanesia, are resolved by customary means. Daily life in small island territories like Tokelau and Wallis and Futuna is almost entirely governed by custom and custom law processes. State-made law barely exists in remote parts of Melanesia, and custom is the only operative system of control if, as in Bougainville during the armed conflict there, state-made law breaks down. Many States depend on custom to maintain local peace and order and have not the wherewithal to replace it with state institutions. Even where state institutions do exist at the local level, they coexist with customary processes.*".[61]

In Pacific Island societies, the characterisation of 'kastom' as law is undisputed. 'Kastom' is frequently described as the inherited or ancestral law in contrast with state-made law.[62] Its ability to maintain local harmony is deemed to be the main strength of 'kastom' as a source of law and legal order by Pacific Island societies.[63]

iii. Recognition by the constitutions and the domestic statutory laws of the Pacific Islands

From the viewpoint of international law, reliance of Pacific Island societies on 'kastom' as law might not suffice to ascertain the legal significance of 'kastom' for an international instrument such as the New York Convention. Therefore, it is essential to underline that 'kastom' has been acknowledged as a source of law not only by the people, but also by the constitutions and the domestic statutory laws of the Pacific Island countries.[64] An in-depth analysis of the various constitutional and statutory provisions for the recognition of customary law in the South Pacific is beyond the scope of this paper. Nevertheless, some of the provisions will be canvassed to provide the reader with an overview of the constitutional and statutory recognition of 'kastom' in the Pacific Islands.

In the majority of countries in the South Pacific, references to 'kastom' can be found in the preambles of the respective written constitutions. For example, the Constitution of the Republic of Fiji stipulates in its preamble:

> "*WE, THE PEOPLE OF FIJI,*
>
> *RECOGNISING the indigenous people or the iTaukei, their ownership of iTaukei lands, their unique culture, customs, traditions and language;*

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59 *See Converging Currents: Custom and Human Rights in the Pacific*, NEW ZEALAND LAW COMMISSION (Oct. 16, 2006), *available at* http://www.lawcom.govt.nz/our-projects/custom-and-human-rights-pacific [*hereinafter* "New Zealand Law Commission Report"].

60 *Id.* at ¶ 4.2.

61 *See* CORRIN & PATERSON, *supra* note 57.

62 New Zealand Law Commission Report, supra note 59, at ¶ 4.3.

63 *Id.*, at ¶ 4.4.

64 For a comprehensive overview of provisions for the recognition of customary law in the Pacific Islands, *see* CORRIN & PATERSON, *supra* note 57, at 53.

> *RECOGNISING the indigenous people or the Rotuman from the island of Rotuma, their ownership of Rotuman lands, their unique culture, customs, traditions and language;*
>
> *RECOGNISING the descendants of the indentured labourers from British India and the Pacific Islands, their culture, customs, traditions and language; and*
>
> *RECOGNISING the descendants of the settlers and immigrants to Fiji, their culture, customs, traditions and language,*
>
> *DECLARE that we are all Fijians united by common and equal citizenry*."."[65]

Similar references to 'kastom' can be found in the preambles of the constitutions of the Cook Islands,[66] Papua New Guinea,[67] Samoa,[68] the Solomon Islands,[69] and Tuvalu.[70] Based on the premise that all policies or values articulated in constitutional, legislative or judicial instruments can qualify as public policies for the purposes of the New York Convention,[71] the constitutional references to 'kastom' strongly support its possible classification as a source of public policy of the South Pacific.

In some states, constitutional recognition of 'kastom' goes beyond a mere reference in the preamble. Article 66A(3) of the Constitution of the Cook Islands reads: [72]

> "*Until such time as an Act otherwise provides, custom and usage shall have effect as part of the law of the Cook Islands, provided that this sub clause shall not apply in respect of any custom, tradition, usage or value that is, and to the extent that it is, inconsistent with a provision of this Constitution or of any enactment.*"

Article 66A(3) of the Constitution of the Cook Islands contains several principles in regard to the legal status of 'kastom': On one hand, the provision expressly states that 'kastom' forms part of the law of the Cook Islands.[73] On the other hand, the restrictive clause in the second part of the provision hints at a scenario in which 'kastom' is not in accordance with other provisions of

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65 The Constitution of the Republic of Fiji*, available at* www.paclii.org/fj/Fiji-Constitution-English-2013.pdf [*hereinafter* "Constitution of Fiji"].

66 The Constitution of the Cook Islands, *available at* http://www.mfem.gov.ck/images/documents/CEO_docs/Legislations/Constitution-of-the-Cook-Islands/Constitution of the Cook Islands as at 17 July 1997 with amendments incorporated.pdf [*hereinafter* "Constitution of Cook Islands"].

67 The Constitution of the Independent State of Papua New Guinea, *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=199188.

68 The Constitution of the Independent State of Samoa, *available at* http://www.wipo.int/wipolex/en/details.jsp?id=7787.

69 The Constitution of Solomon Islands, *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=198229.

70 The Constitution of Tuvalu, *available at* http://www.tuvaluislands.com/const_tuvalu.htm.

71 *Cf.,* BORN, *supra* note 21, at 3665.

72 The Constitution of the Cook Islands, *supra* note 66, art. 66A(3).

73 Art. 95(3) of the Constitution of the Republic of Vanuatu contains a similar provision, stating that "[c]ustomary law shall continue to have effect as part of the law of the Republic of Vanuatu"; *see* The Constitution of the Republic of Vanuatu, art. 95(3), *available at* http://www.paclii.org/vu/legis/consol_act/cotrov406. The difference between the Constitution of the Cook Islands and the Constitution of the Republic of Vanuatu is that the latter does not expressly state any limitations upon the application of customary law; *see also*, CORRIN & PATERSON, *supra* note 57, at 61.

the constitutional or statutory law[74] and, in that case, rules that the colliding law shall prevail over 'kastom'. However, this 'kastom override' does not refute the classification of 'kastom' as a source of public policy. As stated earlier, 'kastom' is dynamic and therefore can also be shaped by other legal norms.[75]

'Kastom' is awarded the highest degree of constitutional recognition by the Constitution of the Federated States of Micronesia.[76] Article XI Section 11 provides that "[*c*]*ourt decisions shall be consistent with this Constitution, Micronesian customs and traditions, and the social and geographical configuration of Micronesia.*" .[77]

In other words, the Constitution obliges the domestic courts to consider Micronesian 'kastom' when they hear a case. By putting emphasis on 'court decisions', Article XI Section 11 also requires that judgments be consistent with Micronesian 'kastom' in their outcome.

Where constitutional recognition has not been granted, 'kastom' has been recognised by statutory law. Kiribati, for instance, has enacted the Laws of Kiribati Act, 1989 whose Section 4(2)(b) stipulates that in addition to the constitution, the laws of Kiribati comprise customary law.[78] Section 5(1) of the Act clarifies that customary law comprises the customs and usages, existing from time to time, of the natives of Kiribati.

In summary, the inclusion of 'kastom' as an equal part of the legal framework in constitutional documents as well as statutes in the PICs substantiates that 'kastom' meets the threshold of a source for a public policy exception.

iv. Recognition by international instruments

Even if the public policy exception laid down in Article V(2)(b) of the New York Convention were to be regarded as referring to a more international concept,[79] this would not invalidate the authors' argument that 'kastom' is a source for public policy for the purposes of the public policy exception. The significance of 'kastom' as a relevant source of law has been recognised not only by the constitutions and the domestic statutory laws of the PICs, but by international law, as well: Article 40 of the United Nations Declaration on the Rights of Indigenous Peoples provides that:

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74 Most importantly, custom may violate fundamental human rights; *see* John B. Henriksen, *Research on Best Practices for the Implementation of the Principles of ILO Convention No. 169, Case Study: 7, Key Principles in Implementing ILO Convention No. 169* 57, INTERNATIONAL LABOUR ORGANIZATION (2008), *available at* http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_118120.pdf [*hereinafter* "Henriksen"].

75 *See* Alexkor Ltd and Another v. Richtersveld Community and Others, 2004 (5) SA 460 (C.C.) (S. Afr.) -("indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life. It has throughout history evolved and developed to meet the changing needs of the community.").

76 *See* Teleilai Lalotoa Mulitalo Ropinisone Silipa Seumanutafa, *Pacific Constitutions Research Network Conference, Samoa's Constitution – The Limited References to Samoan Custom, slide no. 12 et seq*, (Nov. 23-25, 2016), *available at* http://www.paclii.org/pcn/2016/mulitalo.pptx.

77 The Constitution of the Federated States of Micronesia, art. XI, § 11, *available at* www.parliament.am/library/sahmanadrutyunner/micronezia.pdf [*hereinafter* "Constitution of Micronesia"].

78 Laws of Kiribati Act (No. 10 of 1989), § 4(2)(b), (Kiribati), *available at* http://www.paclii.org/ki/legis/num_act/loka1989162.

79 *See* Part II.B.i in regard to the discussion which law governs the public policy exception.

> "*[i]ndigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.*".[80]

Even though the United Nations Declaration on the Rights of Indigenous Peoples is not binding law, it nevertheless reflects emergent customary international law.[81] It is thus part of emergent customary international law that 'kastom' has to be taken into account in the resolution of conflicts to the same degree as state-made laws.

B. 'Kastom' as a Source of Public Policy

i. 'Fundamentality' criterion

As discussed above, not all substantive or procedural rules of a country will be recognised as 'public policy'.[82] In the words of the ILA recommendation, only those policies which contain "*fundamental principles, pertaining to justice or morality*"[83] may qualify as public policy for the purposes of Article V(2)(b) of the New York Convention. The public policy exception was designed to protect the "*fundamental, mandatory policies of national legal regimes*".[84] The analysis conducted in the preceding section of this paper revealed that 'kastom' is recognised as a source of law by the people of the Pacific, by the constitutions and the domestic statutory laws of the PICs as well as by international instruments. As Jennifer Corrin notes, the constitutions' preambles eloquently express 'the dream of a South Pacific jurisprudence' which respects local culture and traditional values.[85] 'Kastom' is deeply woven into the fabric of societies in the South Pacific. Its reconciliation with the imported laws of the European settlers is part of the 'Pacific Way'.[86] Taking all this into account, it is almost trite to state that 'kastom' satisfies the 'fundamentality' criterion of a source of public policy.

ii. 'Clearness' criterion

Some academics advocate the restriction that only those fundamental, mandatory policies of a Contracting State which are '*clearly articulated*' in constitutional, legislative, or judicial instruments may be classified as public policy within the meaning of Article V(2)(b) of the New York Convention (emphasis added).[87] The 'clearness' criterion is not part of the public policy description which was provided by the ILA in 2002.[88] The drafting history of the New York

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80 Constitution of Micronesia, *supra* note 77.

81 *See* Petra Butler, *Red Riding Hood - Is Investor-State Arbitration the Big Bad Wolf?*, 5 PENN. ST. J. L. INT'L AFF. 328, 337; *see also*, James Anaya & Siegfried Wiessner, *The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment*, JURIST (Oct. 3, 2007), *available at* http://www.jurist.org/forum/2007/10/un-declaration-on-rights-of-indigenous.php.

82 *See* Part II.B.i.

83 *See* Mayer & Sheppard, *supra* note 44, at 255.

84 *See* BORN, *supra* note 21, at 3648.

85 *See* Jennifer Corrin, Pacific Legal Systems: Past, Present and Future, Panel Presentation at the 6th Biennial Conference of the Australian Association of Pacific Studies (Apr. 1-3, 2016) *cited by* Tamasailau Suaalii-Sauni, *Legal Pluralism and Politics in Samoa: The Faamatai, Monotaga and the Samoa Electoral Act* 1963, *in* SMALL STATES IN A LEGAL WORLD 185 (Petra Butler et. al. eds., 2017).

86 *See* GUISELIN & JOYAU, *supra* note 18.

87 *See* BORN, *supra* note 21, at 3663.

88 *See* Part II.B.iii.

Convention reveals that proposals to include the restrictive word 'clearly' in the public policy exception were dismissed by the United Nations Conference which adopted the Convention on June 10, 1958.[89] The point can therefore be made that the genesis of Article V(2)(b) of the New York Convention argues against the 'clearness' criterion set out by some commentators. However, neither does the ILA recommendation amount to an authoritative interpretation of 'public policy' nor is there any other binding definition of the term. Hence, it has to be ascertained whether 'kastom' can be regarded as a 'clearly articulated' policy, thereby qualifying as public policy in the eyes of the aforementioned commentators.

The main issue in this context is that 'kastom' is largely unwritten and verbally passed down among generations.[90] It may therefore be difficult to ascertain the exact content of a certain 'kastom'. An obvious solution to this problem would be a codification of 'kastom'. Indeed, some attempts have been made to codify aspects of 'kastom' in the PICs: the Marshall Islands have established a 'Customary Law and Language Commission' whose duty is "*to codify the customary law of the Marshall Islands […] in order to enable the country to have a unified customary law*".[91] In 2015, the Samoan kastom of *monotaga* was codified by the Electoral Amendment Act No. 5.[92]

However, the experience of Samoa has shown that the codification of 'kastom' can be largely opposed for various reasons.[93] Jean Zorn and Jennifer Corrin contend that "*[b]y its very nature, a codification, which would freeze the rules as they were at the moment they were written, would lose the essence of kastom, which is that it is unwritten and changes all the time, as the culture of which it is an expression changes or simply to accommodate the needs of the parties.*".[94] This view is shared among researchers of the South Pacific. As Teleilai Lalotoa Mulitalo Ropinisone Silipa Seumanutafa, the Executive Director of the Samoa Law Reform Commission, points out:[95]

"*Codification freezes custom to the extent it loses flexibility. Customary norms and standards are too flexible and uncertain to be encompassed in precise phraseology. It is the flexibility of customary norms that gives them life and endurance; to deprive them of this is to deprive them of life.*".[96]

iii. Concepts of public policy may change

So does the fluidity and adaptability of 'kastom' to changing circumstances hinder its classification as a 'clearly articulated' public policy for the purposes of Article V(2)(b) of the New York Convention? Taking a closer look at the concepts of 'kastom' and public policy, the point that 'kastom' may not be recognised as 'public policy' due to its alleged lack of precision cannot be made. On the contrary, the contents of public policy are subject to temporal changes, as

89 *See* WOLFF, *supra* note 23, at 483.

90 *See* Nilupuli Ariyaratne, *Can Indigenous Customary Law be used and recognised in International Commercial Contracts?*, VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPER 23 (2016) *available at* http://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/5084/paper.pdf?sequence=1.

91 Customary Law and Language Commission Act 2004, §§ 103(1), 103(2) (Marshall Islands), *available at* http://rmiparliament.org/cms/images/LEGISLATION/PRINCIPAL/2005/2005-0034/CustomaryLawandLanguageCommissionAct2004_2.pdf.

92 *See* Suaalii-Sauni, *supra* note 85, at 175.

93 In regard to the arguments put forward against the codification of customs in Samoa's laws, *see* SEUMANUTAFA, *supra* note 17, at 62.

94 *See* ZORN & CARE, *supra* note 58, at 47.

95 *See* SEUMANUTAFA, *supra* note 17, at 18.

96 *See Id.*

well.[97] In other words, fluidity and dependence on ever-changing concepts of morality and justice are common features of 'kastom' and public policy. As Reinmar Wolff convincingly states:

> "*[A] best practice standard for public policy needs to be dynamic. A static standard could not take into account the fact that public policy is always subject to temporal changes.*".[98]

Concepts of public policy may change.[99] The authors strongly endorse the following view taken by the New Zealand Court of Appeal in *CBI New Zealand Limited* v. *Badger BV and Chiyoda Chemical Co. Limited*:

> "*Even within any given common law country the courts cannot by the doctrine of precedent stereotype public policy; what was once the rule need not be accepted as required by current conditions: […] As is said in Cheshire, Fifoot and Furmston on Contracts, 11th ed. 345, 'Since public policy reflects the mores and fundamental assumptions of the community, the content of the rules should vary from country to country and from era to era'. This does not mean that prior decisions based on public policy as judicially conceived at the time are lightly to be abandoned and the issue automatically approached anew. I think it means rather that the Court should not automatically assume that past public policy is sacrosanct. Changes in society or in attitudes prevailing internationally may show that apprehensions once seen as real and weighty are obviously no longer so.*".[100]

As the New Zealand Court of Appeal pointed out in the aforementioned judgment, what can be regarded as public policy does not only vary from time to time, but also from place to place. Again, this is a commonality between public policy and 'kastom'. The Constitution of the Republic of Fiji illustrates the connection of 'kastom' to the local environment: Its preamble does not reference a singular 'Fijian' 'kastom', but differentiates between four different customs – among them the customs of "*the indigenous people or the Rotuman from the island of Rotuma*".[101] The Fijian example shows that 'kastom' in the South Pacific is a multifaceted phenomenon whose manifestations may vary not only from state to state, but also from island to island.

C. Limitations for the Recognition of Kastom as Public Policy

As discussed under Section II.1. of this paper, Article V(2)(b) of the New York Convention, as a 'lower limitation' of the Contracting States' leeway, entails their obligation not to fall below a minimum level of content, most importantly a duty to respect their obligations towards other states or international organisations.[102] In the context of this paper, it is therefore important to stress that the recognition of 'kastom' as public policy does not suspend the PICs' international human rights obligations: 'kastom' cannot be recognised if it violates fundamental international human rights.[103] It is beyond the scope of this paper to discuss possible collisions of PICs' 'kastom' and international human rights at any length. For the purposes of this paper it suffices to state that the recognising courts have to include a human rights analysis in their decision-

97 *See* WOLFF, *supra* note 23, at 495.
98 *See* WOLFF, *supra* note 23, at 513.
99 *See* OTTO & ELWAN, *supra* note 33, at 367.
100 *See* CBI New Zealand Ltd. v. Badger BV and Chiyoda Chemical Co. Ltd. [1989] 2 NZLR 669 (CA) at [674] (N.Z.).
101 Constitution of Fiji, *supra* note 65.
102 *See* WOLFF, *supra* note 23, at 506.
103 *See* Henriksen, *supra* note 74, at 62.

making process.[104] By doing so, they will be able to ascertain whether a certain 'kastom' can be recognised as public policy for the purposes of Article V(2)(b) of the New York Convention or whether recognition of the kastom at play has to be denied because it violates the Contracting State's international human rights obligations.

IV. Conclusion and Outlook

The aim of this paper was to demonstrate that, under the conditions and within the limitations set out in the previous sections of this paper, 'kastom' can be recognised as a source for the public policy exception of Article V(2)(b) of the New York Convention. Hence, fears in the PICs that their 'kastom' may be left aside or overridden as soon as they decide to join the international arbitration community would be ill-founded. The public policy exception laid down in Article V(2)(b) of the New York Convention is the methodological vehicle of choice to enable the PICs to retain their 'kastom' while they enter the world of international arbitration. In fact, arbitration might be related more closely to traditional dispute resolution mechanisms than one might think at first glance. In 2001, the Supreme Court of the Federated States of Micronesia ["**FSM**"] expressly approved the arbitration process as being consistent with Micronesian customs and traditions:[105]

> "*The FSM Constitution requires that our Court decisions be consistent with Micronesian customs and traditions. The Court finds that non-judicial settlement of disputes is entirely consistent with Micronesian customs and traditions, whether it be by arbitration or some other form of alternative dispute resolution. The time and expense of judicial proceedings can make them prohibitive for some people. The less confrontational atmosphere of non-judicial proceedings may be attractive to parties for many reasons.*".[106]

Considering that 'kastom' has been awarded the highest degree of constitutional recognition by the FSM Constitution,[107] the Micronesian Supreme Court's assessment might convince sceptics in other parts of the Pacific Islands that there is no need for them to have any fears regarding international arbitration.

Which 'kastoms' specifically meet the threshold of reflecting '*fundamental principles, pertaining to justice or morality*' will be a matter of the courts of the respective PICs to identify.[108] It has to be noted, that in the pro-enforcement and pro-recognition spirit of the New York Convention, courts should be very careful to find a violation of public policy.[109] It is well accepted that public policy encompasses procedural as well as substantive rules.[110] Procedural public policy comprises rules related to,[111] for example, the right to be heard, the prohibition on being submitted to an arbitration to which one has not consented to in a valid agreement, or the prohibition on

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104 In regard to the similar arbitral tribunals' responsibility to include a human rights analysis in their decision-making process, *see* Butler, *supra* note 81, at 362, 370.

105 *See* E.M. Chen And Associates (FSM) v. Pohnpei Port Authority, [2001] 10 FSM Intrm. 400, 408 (Micr.).

106 *See Id.*

107 *See* Part III.A.ii.

108 *Cf.* regarding the acknowledgement of custom as part of the domestic law, Ngati Hurungaterangi v. Ngati Whaio [2017] NZCA 429 (N.Z.) *with* Bidois v. Leef [2017] NZCA 437 (N.Z.) (discussing Tikanga Maori).

109 *Cf.* KRÖLL, *supra* note 47, at 139.

110 *Id.* at 139, 143.

111 *Cf.* The International Arbitration Act 2017, *supra* note 8, § 54.

obtaining awards by fraudulent means.[112] Substantive rules pertain to issues, such as the claim that the enforcement of the award would be illegal[113] or the contract, which forms the basis of the claim to be enforced, is illegal.[114] Recognising these 'kastoms' as a matter of public policy will go a long way in encouraging accession of these PICs to the New York Convention.

[112] *See Id.* § 55(1)(a).
[113] *See* Phulchand Export v. OOO Patriot, (2011) 10 SCC 300 (India).
[114] *See* AJU v. AJT, [2011] SGCA 41, [2011] 4 SLR 739 (Sing.).