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The New York Convention: 50 Years Of Experience

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Commentaries

A New New York Convention? Interview With Albert Jan van den Berg

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[Editor's Note: Albert Jan van den Berg is a partner with Hanotiau & van den Berg in Brussels, Belgium, and is Professor at Law (arbitration chair) at Erasmus University in Rotterdam. He is President of Netherlands Arbitration Institute, former Vice-President of London Court of International Arbitration and member of International Council for Commercial Arbitration, Commission on International Arbitration of the International Chamber of Commerce, LCIA Company and Dubai International Arbitration Centre. Dr. van den Berg serves on various panels of arbitrators. Julie Bédard is counsel in Skadden, Arps, Slate, Meagher & Flom LLP's Litigation Group, where she concentrates her practice on international litigation and arbitration. She has acted as sole arbitrator in an ICC arbitration and an UNCITRAL arbitration. *Replies to this commentary are welcome.]*

You have recently proposed a Draft Convention on the International Enforcement of Arbitration Agreements and Awards — a new New York Convention — at the ICCA conference in Dublin. Indeed, some have taken the liberty of christening your draft the "Dublin Convention."

Impetus for Change?

Q: At the 40th anniversary of the New York Convention ten years ago, you had indicated then that you did not see a need for an overhaul of the Convention. What international arbitration trends or phenomena have you seen or experienced in the past decade that have led you to advocate a revision of the New York Convention?

A: I did not change my mind overnight, or by happenstance. Rather, I have gradually come to understand, based on my experience in the field, that national courts still are grappling with the text of the Convention. I thought a revised Convention might serve to address problems with the judicial application of certain provisions. Imagine a judge who reads Article I(1) of the Convention. First, he or she reads that the Convention applies to an arbitral award made in another State. It seems clear until he or she reads the next sentence: "It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." The confusion doesn't stop there. To give another example, how should he or she interpret: "a competent authority of the country in which, or under the law of which, that award was made" in Article V(1)(e)?

Q: Statistics have been cited by certain members of the international arbitration community purporting to show that a large majority of international arbitral awards presented for enforcement under the New York Convention are enforced without any problems by national courts. Does the axiom "if it ain't broke, don't fix it" still apply?

A: The New York Convention has shown increasing signs of wear and tear over the years, and I think we are about to reach a point where it will be necessary to begin a dialogue on revising and revamping the Convention to make it more accessible for end-users (parties, arbitrators, institutions, judges and legislatures). The point is not that the majority of awards are enforced without controversy or issue. The

point is that the arbitration community should not be complacent or satisfied with a Convention which is 50 years old and is beginning to show "cracks." In order for international arbitration to progress further along the path of development, it is necessary to make sure its pillar instruments are in sync with modern perspectives and prevailing judicial interpretations in international arbitration. Let us not forget that the 1958 New York Convention came to be in part due to the indefatigable efforts of its drafters to replace the 1927 Geneva Convention that was in existence for some 30 years only. As heirs of this legacy, why should we allow weaknesses in the Convention to continue to reside in its text?

Key Features

Q: What are the salient aspects of your Draft Convention?

A: I have prepared an Explanatory Note to my draft Convention that details the various proposed revisions and additions to the Convention (available at: *http://www.arbitration-icca.org*). Some of the more significant revisions that can be highlighted are:

a) A list of criteria defining the arbitration agreements falling under the Convention, and making clear that the Convention applies to "international" awards, irrespective of the place where the award was rendered;

b) Abolishing the requirement that the arbitration agreement have the written form;

c) A list of circumstances under which the court shall *not* refer the dispute to arbitration;

d) A provision making the grounds for refusal of enforcement mandatory in nature, by substituting "may" for "shall;"

e) The denial of enforcement of an award solely in "manifest cases;"

f) The denial of enforcement of an award annulled in the country where made on a limited number of grounds only;

g) The modification of the public policy ground to deny the enforcement of an award to refer to "international" public policy and the violation thereof.

Selected Concepts

Q: *"International" v. "Foreign" Arbitral Awards*. In contrast with the New York Convention, the Draft Convention no longer refers to the enforcement of foreign arbitral awards, but rather to the enforcement of international arbitration agreements and arbitral awards. How does this clarify or modify the scope of the New York Convention?

A: The replacement of "foreign" with "international" is meant to highlight the fact that the draft Convention does not distinguish between an award made abroad and an award made within the country in which enforcement of the award is sought. It removes any ambiguity that an award is subject to the Convention regardless of where it is rendered, so long as its criteria is "international" under the definition found in Article 1(1) of the draft Convention. This is nothing else than synchronizing the field of application of the Convention with that of the UNCITRAL Model Law of 1985.

Q: *Arbitration Agreement Not Valid on Prima Facie Analysis*. Article 2(a) of the Draft Convention states that the national court "shall not refer the dispute to arbitration" if "there is *prima facie* no valid arbitration agreement" under the law of the country where the award will be made. There is no comparable provision in the New York Convention. What is the purpose of this new provision?

A: The underlying idea is: "Arbitrate First!" If a party has an objection, it should be resolved in first instance by the arbitral tribunal, subject to *ex post* control by the courts. The *prima facie* test is simply to filter out those cases in which is it clear beyond doubt that no valid arbitration agreement exists.

Q: *Manifest Cases*. Can you explain the requirement that the enforcement of an arbitral award, notwithstanding the presence of a ground for refusal of enforcement, be refused only in "manifest cases," as provided under Article 5(2) of proposed Draft Convention?

A: By requiring that enforcement be refused only in "manifest cases," Article 5(2) of the proposed draft Convention comports with the underlying rationale that enforcement should be refused by a national court solely in serious cases where it is "clear" or "manifest" that the refusal of enforcement is justified. It also aims at neutralizing the debate whether the present Convention permits courts to grant enforcement notwithstanding the presence of a *de minimis* ground for refusal of enforcement.

Q. *International Public Policy*. In the Draft Convention, you have proposed that the public policy exception referred to in Article V(2) of the New York Convention on permitted grounds against the denial of enforcement of awards, be clarified to mean "*international* public policy." What is the rationale for this suggestion?

A: This reflects the narrower category of "international public policy" developed by the courts of several countries with respect to the New York Convention. Previously, some national courts had interpreted "public policy" as including the domestic public policy of the country in which the award was sought to be enforced. The standard of "international" public policy elevates the debate to the right level playing field.

Q: *Courts to Act Expeditiously*. The Draft Convention includes a provision requiring courts to "act expeditiously on a request for enforcement of an arbitral award." What prompted you to include this provision? Is it more aspirational than prescriptive?

A: This arose out of my experience with the enforcement of awards in certain legal systems. I noticed that in a number of Contracting States, the procedure for the enforcement of Convention awards is unacceptably slow. I accept that this may be an inherent aspect of a country's judicial system, but it is my hope that the new provision will spark a dialogue among the legislatures and arbitration practitioners of those Contracting States to perhaps examine a process for streamlining the enforcement of Convention awards in their countries. That, I think, would be a significant step forward.

The New York Convention And The National Courts

Q: What are your views on the observation that problems in the enforcement of international arbitral awards in national courts arise not because of inherent textual inadequacies in the New York Convention, but rather are due to its misapplication by state judiciaries? Is it possible to remedy "erroneous" decisions by educating national judges on the "proper" approach and application of the New York Convention?

A: We should give more credit to national judges. Where there is a misapplication, it is regularly due to the fact that the text as it currently stands is not crystal-clear as to its meaning. This, in turn, may create unclear argument by counsel. This is precisely what the revised draft of the Convention aims to accomplish with its "clean-up" of various provisions, as well as the addition of new provisions – to avoid instances of judicial misapplication of a particular provision because of a lacunae or vagueness in the Convention.

Political Will

Q: What are your thoughts on amending national arbitration laws instead of attempting a more ambitious revamping of the New York Convention, as suggested by Professor Gaillard?

A: I think that Professor Gaillard refers to the part of national arbitration laws that concerns enforcement of foreign arbitral awards outside the New York Convention. Article VII(1) of the Convention indeed allows to rely on such laws if they are more favorable than the Convention. The more favorable regime may be set forth in statute law or have been developed by case law. Few countries, such as France, have such laws. I don't think that amending national arbitration laws is the solution here. Those amendments, if carried out at all, will vary and create a lack of uniformity.

Q: Do you believe that there currently exists sufficient political will among signatory States to undertake a revision of what is considered to be one of the most successful international treaties? What do you make of Emmanuel Gaillard's comment that there is "no hope" that the more than 140 signatory States will come to a consensus on a revised Convention; and that we may even face the danger that certain signatory States, perhaps because of their perceived negative experiences in investor-state arbitration in recent years, would elect to opt out of any revised version of the Convention?

A: I am not persuaded by the argument on the lack of political will. As many people know, I am an optimist by nature. The will to revise the Convention has to start with an open dialogue within the arbitration community around the world. If and when sufficient consensus builds among practitioners and arbitrators that the need for revision exists, I believe the political will of States to revamp the Convention will be there to meet this need. I should note that my draft Convention does not represent a radical departure from prevailing practices and norms in international arbitration. I have not seen signs of States that wish to opt out of the current New York Convention. The Convention does not negatively affect investor-State arbitration, which, moreover, represents only a fraction of current international arbitration. The vast majority of cases is amongst commercial enterprises. Insofar as an updated Convention is concerned, whilst there is no immediate urgency and the project will take time, I think that States will ultimately opt in favor of such a Convention. ■