was discussed at length by the Maritime Law Association of the United States, meeting in New York at the beginning of May. It has also been discussed by the American Institute of Marine Underwriters.

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I will try to respond to the question that has been raised by D. Jacobsen. The first paragraph of article 10 of the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade indicates the cases in which the operator has the right to keep the goods. This right to keep the goods can be exercised once the amount is due to the operator for services which he has fulfilled with respect to the goods regarding which he is exerting his claim to keep them. This article does not distinguish according to the debt or absence of payment between the carrier or the owner of the merchandise. Moreover, in practice, the price paid for the transportation contract by the shipper covers specifically the loading and unloading operations of the goods. If the carrier who has received his payment for transportation does not pay the amount due during the loading or unloading of the goods, then the terminal operator who has fulfilled his loading and unloading operation can exert his right to keep the goods. This is a situation which was one covered by the Conference which adopted the Convention. The remedy provided by the Conference for this purpose is indicated in the second paragraph of this same article 10. The owner of the goods might prefer to pay directly himself to the operator of the transport terminal, or deposit in the hands of a third party a sufficient guarantee to free the goods. At this point the operator of the transport terminal with the benefit of the guarantee has to free the merchandise, and it has to be known between the carrier or the operator what their specific rights are. I think that the Conference, in paragraphs 1 and 2 of article 10, has in this respect provided a rule and principle which satisfies the interests of the operator of the transport terminal, and also an auxiliary rule, that is, conciliation and guarantees, which covers the interests of the owner of the goods.

B. Dispute settlement

1. Some practical questions concerning the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

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The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) is generally acclaimed to have been the most successful treaty in the field of international private law. While UNCITRAL, with all its modesty, does not count the New York Convention as one of its achievements, it must be publicly acknowledged that UNCITRAL has largely contributed to the Convention's success. Look at the number of contracting States. When UNCITRAL was established in 1967, 31 States were parties to the Convention. As of its inception, UNCITRAL has actively promoted ratification of the Convention. Now, 25 years later, UNCITRAL's promotional efforts have had as a result that 85 States are parties to the Convention.

The Convention's success is evidenced not only by the number of contracting States. It is also demonstrated by the court decisions in which the Convention has been interpreted and applied worldwide. These court decisions have been monitored and analysed in the *Yearbook Commercial Arbitration* since the first volume in 1976. The 17 volumes of the *Yearbook* which have appeared to

date have reported more than 475 cases from 35 contracting States. The cases show that the courts generally interpret and apply the Convention in a rather favourable manner. In fact, the following percentages evidence the outstanding achievement of the New York Convention: the referral by the courts to arbitration, which is the first action contemplated by the Convention, has been refused in 5 per cent of the cases only. Even more impressive is the percentage concerning the refusal of enforcement of the arbitral award, which is the second action provided by the Convention: in only 2 per cent of the cases was enforcement of an award refused by the courts.

Having regard to these percentages, one is inclined to think that the Convention is practically trouble-free. To a large extent, this is indeed the case. I should add: not withstanding the text of the Convention itself, which is not always clear as it reflects compromise solutions at various places.

Yet, the Convention has raised certain problems in practice. I have listed a number of these problems in the form of six questions which may be found in summary number 20 of the papers distributed at the Congress.

Before discussing a number of these six questions, a few words may be devoted to their solution. They are identified in the summary as well. Here a distinction should be made between (i) a solution which can likely be achieved by a reasonable interpretation of the Convention itself, and (ii) a solution which is not likely to be achieved by a reasonable interpretation of the Convention, but by some other measures.

As regards the solution on the basis of an interpretation, it is my view that the interpretation should be easily acceptable by courts in a great variety of jurisdictions. This rules out interpretations which are squarely against the system and text of the Convention. It also rules out certain interpretations that are the result of what may be described as sophisticated academic thinking. In my opinion, the Convention should be construed in a manner that is readily understandable to judges and practitioners in all corners of the world. If these principles of what I call "reasonable interpretation" are not adhered to, the present certainty, which is offered by the Convention, may be lost.

With respect to solutions that are not likely to be achieved by an interpretation of the Convention, the measures may include the following. First, there is the possibility of a new treaty. A new treaty has the advantage that the problems can be solved in a uniform manner on a supranational scale. It has the additional advantage that the Convention, which is now some 34 years old, can be modernized. On the other hand, a new treaty has the disadvantage that it takes a long time before a sufficiently large number of States have become a party to it. In the interval, uncertainty will exist as to which regime applies.

The second measure is an amendment of the present Convention, for example by means of a protocol. The advantage is that it may again solve the problems on a supranational scale. However, the same disadvantages as for a new treaty apply also to amendment of the Convention by means of a protocol or the like.

The third measure is a model law setting forth a uniform implementing act for the New York Convention. As you may know, a number of countries have implemented the New York Convention by means of an implementing act. Examples are chapter 2 to the Federal Arbitration Act of the United States and the English Arbitration Act 1975. It appears that the implementing acts are widely divergent. The advantage of a model law setting forth a uniform implementing act is that this divergence will disappear. In the model law, the problems may be solved by appropriate provisions. Another advantage of a model law on implementing the New York Convention is that it may be easier to accept a model law than a new international treaty or protocol to the existing Convention. The

disadvantage of a model law is that not all States require an implementing Act for a convention to become effective within the internal legal order. Another disadvantage is that it may take a long time before a sufficiently large number of States have adopted the model law. Furthermore, being a model law, States will be free to deviate from its text.

Finally, the fourth measure is the adoption of the UNCITRAL Model Law on International Commercial Arbitration. The Model Law incorporates the New York Convention in its article 36. The Model Law can be applied instead of the New York Convention both to the referral by a court to arbitration and to the enforcement of an arbitral award made in another state. The New York Convention, in its article VII, paragraph (1), provides for reliance on the law of the country where enforcement is sought, if that law is more favourable to the enforcement of foreign arbitral awards than the Convention itself.

Against this background for solving the six questions which have arisen in practice and which are identified in the summary, I may now briefly phrase for each question the issue and the solution which I would recommend.

Question 1

Does the Convention's field of application need to be clarified with respect to the question what is to be understood by the place where the award is made (article I(1))?

The issue

According to article I, paragraph (1), the Convention applies to the recognition and enforcement of arbitral awards ". . . made in the territory of a State other than the State where the recognition and enforcement of such awards are sought".

In a recent decision of the United Kingdom House of Lords - the *Hiscox* case - the following happened. The arbitration was in all respects English. The two parties were English. The arbitration hearings were held in London. The contract was governed by English law. And the arbitrator was an English Queen's Counsel. In the award, just above the signature, the arbitrator stated "dated at Paris, France, this 20th day of November 1990". Why? Well, because the arbitrator had joined the French office of a United States law firm and resided overseas, that is, in Paris.

In setting aside proceedings with respect to the award before the English courts, the question arose whether these proceedings could be entertained. It was argued by one of the parties that the award was made in Paris and therefore governed by the New York Convention. The House of Lords indeed accepted the argument that the signing of the award in Paris meant that the award was made in Paris and that, therefore, the Convention applied.

A number of problems arise out of this interpretation of the Convention. One of them is a rather practical one: for the sole purpose of signing an award, arbitrators have to travel to the place of arbitration. This is contrary to current practice, according to which an award is signed by circulating it amongst the members of the arbitral tribunal. The House of Lords' interpretation, therefore, may cause a significant increase in the costs of the arbitration.

Suggested solution

The first question can be resolved by a reasonable interpretation. It is a generally accepted principle that the award should be made at the place of arbitration. Or, as the UNCITRAL Model Law

correctly puts it in its article 31(3): "The award shall be deemed to have been made at [the] place [of arbitration]". Consequently, the inquiry as to where the award has been made for the purposes of the Convention is an inquiry as to which was the place of arbitration, and not - as the House of Lords assumed - which was the place of signing of the award.

It is current practice and a requirement under many arbitration laws that the award specifically mentions the place of arbitration. If arbitrators have omitted to do so, one is permitted to look to the agreement of the parties as to the place, or to a determination by the arbitral tribunal to that effect during the arbitral proceedings.

By following these rules in practice, no problem will, in my opinion, arise.

Question 2

Does the field of application of the Convention need to be clarified with respect to the question whether it applies to an "a-national" award (i.e., an award resulting from an arbitration which, by agreement of the parties, is detached from any national arbitration law)?

The issue

In the context of the New York Convention, denationalized arbitration is rather exceptional in practice, because in almost all cases an arbitration appears to be governed by the arbitration law of the place of arbitration. This practice is confirmed by the 475 decisions concerning the Convention that have been reported so far.

The Supreme Court of the Netherlands, by a decision rendered in 1973 in the famous case *SEEE* v. *Yugoslavia*, seems to be one of the three courts which is of the opinion that the "a-national" award comes within the purview of the Convention. This view is shared by the French Court of Appeal of Rouen with respect to the same award in the *SEEE* v. *Yugoslavia* case. The third court is the United States Court of Appeals for the Ninth Circuit in *Gould* v. *Iran*, which ventured the concept of denationalized arbitration in relation to the Convention and the special category of arbitrations of the Iran-United States Claims Tribunal.

Suggested solution

The second question can be solved by a reasonable interpretation. The Convention can be kept simple and clear if one follows the interpretation that the Convention does not apply to denationalized arbitration. There are good arguments in support of this interpretation. Article I read in conjunction with article V(1)(a) and (e) of the Convention show that the Convention requires that the arbitral award be based on an arbitration that is governed by a national arbitration law. This requirement is confirmed by the *travaux préparatoires* of the Convention.

More generally, the Convention should, in my opinion, be limited to what is generally understood as arbitration. Its clear object should not be blurred by what may be called "wildcat" proceedings, such as denationalized arbitration, or alternative dispute resolution relating to mediation and conciliation. If the scope of the convention were to be widened to include these proceedings akin to arbitration, much confusion would arise because of the uncertain legal status of these proceedings.

Question 3

Is the written form required by the Convention too severe for the practice of international trade (article II(1)-(2) of the Convention)? In particular:

(a) Should it validate a tacit acceptance of the contract containing the arbitration clause?

(b) Should it cater to an arbitration clause in standard conditions?

The issue

Article II(2) of the New York Convention provides: "The term 'agreement in writing' shall include the arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." This requirement as to the form of the arbitration agreement offers two alternatives for the validity of the arbitration agreement.

The first alternative is an arbitration agreement or an arbitration clause in a contract signed by both parties. This alternative, of course, does not pose a problem.

The second alternative is that the arbitration agreement or arbitration clause is contained in an exchange of letters. This excludes a tacit acceptance of the arbitration clause. And that does pose a problem. It regularly happens in practice that after a contract is concluded by, for instance, telephone, a party sends a purchase or sales confirmation to the other party which does not return it to the former party. Then, during or after performance, when a dispute arises, the latter party invokes the lack of formal validity under article II, paragraph (2), of the Convention on the grounds that the arbitration clause has not been contained in an exchange of letters. This could not happen under most national arbitration laws since they are less stringent than the New York Convention regarding the required form of the arbitration agreement.

As regards an arbitration clause contained in standard conditions, the text of the New York Convention is totally silent thereon. Yet, standard conditions are frequently used in international trade, so that appropriate solutions are needed.

Suggested solution

The above question in subparagraph (a) might be solved on the basis of a reasonable interpretation. The requirement as to form laid down in article II, paragraph (2), is generally conceived as both a rule of uniform law and a maximum and minimum requirement. Thus, the form of the arbitration agreement may not be subjected to more onerous or less onerous conditions. Of course, the exchange of letters can be interpreted in a broad way, in the sense that it is readily accepted that an exchange did occur. However, this does not solve all problems. In those cases a textual interpretation may help. The text of the second paragraph of article II states: ". . . shall include . . ." Textual interpretation might then be ". . . shall include but is not limited to . . ." As a consequence, a court may accept an arbitration agreement which is in writing, but which has only been tacitly accepted, provided that such acceptance is legally valid under the applicable law.

I hasten to add that this interpretation has scarcely been advanced under the New York Convention to date. This interpretation, however, is permissible because it is not against a text of the Convention and would be in conformity with the current needs of international trade.

While I think that the above interpretation is reasonable, in the event that it is not accepted, the solution would seem to be the adoption of one of the measures 1, 2 or 3 mentioned in my summary.

As regards the above question in subparagraph (b) concerning the arbitration clause in standard conditions, this can be solved by a reasonable interpretation as well. The courts have established in cases under the New York Convention that if the arbitration clause is printed on the back of a contract, a general reference clause on the front page of the contract to the conditions on the back will suffice. If the standard conditions are printed on another document, the reference clause in the contract should be more specific. It should then draw specific attention to the arbitration clause in the general conditions. It appears that practice is increasingly aware of this requirement for the reference clause as more and more standard contracts contain reference clauses which draw specific attention to the arbitration clause, in the standard conditions.

This interpretation regarding standard conditions is also laid down in the UNCITRAL Model Law. Article 7(2), provides as follows: "The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract".

Question 4

Should the Convention specify which arbitration agreements fall under the referral provisions of article II(3)?

The issue

Article II (3) of the Convention contains the first action envisaged by the Convention. It provides that a court of a contracting State shall, at the request of one of the parties, refer the parties to arbitration when it is seized of an action concerning a matter in respect of which the parties have made an arbitration agreement. However, the Convention does not specify which arbitration agreements qualify for referral to arbitration pursuant to article II (3).

Suggested solution

This question can be solved by a reasonable interpretation. For solving the omission, it would be consistent to interpret article II(3) in conformity with article I which provides for the Convention's field of application in respect of the arbitral awards. Article I is mainly based on an award made in another State. Accordingly, article II(3) can be deemed applicable to an agreement providing for arbitration in another State. This interpretation is generally followed by the courts in the contracting States.

Two other categories of arbitration agreements may pose more problems: an agreement providing for arbitration within the State in which it is invoked, and one failing to indicate the place of arbitration. It is clear that article II(3) does not apply to purely domestic arbitration agreements. Possible criteria for the application of article II(3) in these two cases therefore can be: (a) foreign nationality of at least one of the parties; and/or (b) an international element connected with the contract to which the arbitration agreement relates. The implementing acts and the courts are not yet unanimous with respect to the application of these criteria in the case of an arbitration agreement providing for arbitration within the State in which the agreement is invoked.

In this connection, I should mention that no problem of this sort will arise if a country has adopted the UNCITRAL Model Law. The Model Law simply obliges a court to refer to international arbitration

whether the place of arbitration is within or outside the State where the arbitration agreement is invoked (article 8(1) in conjunction with article 1(2)).

Question 5

With respect to the ground for refusal of enforcement set forth in article V(1)(d) of the Convention, should enforcement be refused:

(a) In the event that the parties' agreement on the arbitral proceedings violates the mandatory provisions of the arbitration law of the place of arbitration;

(b) In the event that, in the absence of an agreement of the parties on the arbitral proceedings, the proceedings do not comply with a mandatory or non-mandatory provision of the arbitration law of the place of arbitration.

The issue

Article V(1)(d) of the Convention provides that enforcement of an award may be refused if the respondent can prove that: ". . . the composition of the arbitral authority or 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." According to this text, the agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure ranks first; only in the absence of such agreement would the law of the country where the arbitration took place have to be taken into account.

What happens if, in a deviation from the parties' agreement, the mandatory rules of the place of arbitration have been followed? For example, it may happen that the arbitration agreement provides for two arbitrators, whilst the arbitration law of the place of arbitration requires an uneven number of arbitrators. If indeed the arbitration has been conducted by an uneven number of arbitrators, may enforcement then be refused because the number of arbitrators was not in conformity with the agreement of the parties? This has led to diverging decisions. The Italian courts refused enforcement of the award in this case. On the other hand, Spanish and United States courts were of the opinion that the mandatory rules of the place of arbitration prevailed.

Suggested solution

The question can be solved by a reasonable interpretation. Article V(1)(d) should not be read in isolation but in the context of the entire article V. Without going into details, this has as a result that in all cases the mandatory rules of the place of arbitration prevail.

The same applies to compliance with non-mandatory provisions of the arbitration law of the place of arbitration. However, an enforcement court can be deemed to be allowed to disregard a minor violation of the arbitration law of the place of arbitration. Such a latitude is conferred upon the court by the introductory language of the first paragraph of article V which says that a court "may" refuse enforcement.

Question 6

With respect to the grounds for refusal of enforcement set forth in article V(2) of the Convention:

(a) Should the Convention make an explicit distinction between public policy as to procedure and public policy as to substance?

(b) Should the Convention expressly provide for "international" public policy as grounds for refusal of enforcement?

The issue

Article V(2)(b) of the Convention provides that recognition and enforcement of the arbitral award may be refused if the enforcement court finds that "the recognition and enforcement of the award would be contrary to the public policy of its country". This provision does not make a distinction between public policy as to procedure and public policy as to substance. Nor does it limit the public policy to the so-called "international" public policy.

In practice, the courts bring both procedure and substance under the public policy provisions of the Convention. As regards procedural questions, it may be wondered whether this is not a duplication of the grounds for refusal set forth in article V under (1) (b), according to which enforcement may be refused if the respondent can prove that he has not received proper notice of the appointment of the arbitrator or of the arbitral proceedings, or has otherwise been unable to present his case (the so-called due process provisions). The difference between the first and second paragraph of article V is that the grounds for refusal of enforcement listed in the first paragraph must be asserted and proven by the respondent, whilst those of the second paragraph can be applied by an enforcement court on its own motion.

A limitation to international public policy has as a consequence that the number of matters pertaining to public policy may be smaller than those prevailing in domestic situations. Consequently, local particularities will have less influence on the international arbitral process.

Suggested solution

Both questions can be solved by a reasonable interpretation. As regards the distinction between procedure and substance, it does not matter that due process violations can be based on two provisions. In fact, it seems justified that procedural violations are also included in the public policy provisions which can be applied by a court on its own motion. This may in particular be appropriate in those cases where the respondent does not participate in the enforcement proceedings. The enforcement court then still has the possibility to block enforcement in cases of a serious violation of due process.

As regards the international public policy, an increasing number of courts is interpreting the Convention in this way. Considering this judicial trend, there does not seem to be a need to lay down specifically in the Convention itself the notion of international public policy.

Conclusion

Due to time constraints, I have to leave aside questions 3 through 6 listed in my summary. Suffice it to say, in conclusion, that all the above questions can be solved by a reasonable interpretation, with one possible exception, question 3 (a) above concerning the requirement that the arbitration agreement be contained in an exchange of letters. Although this question might be solved by a reasonable interpretation, if such an interpretation is not accepted, action by UNCITRAL may be required. However, I submit that the problem is not so critical that it justifies the setting into motion of an amendment process which will require much effort and time. It has not undermined the overall success of the Convention, and practice has shown that we can live with certain imperfections.

One final observation. Most of the interpretations which are given above are expressly confirmed by the UNCITRAL Model Law on International Commercial Arbitration. This fact underscores the usefulness of the Model Law. The message then seems to be clear for future action: keep the venerable, well-established New York Convention in place as it is, and direct all efforts towards the adoption of the UNCITRAL Model Law, or at least legislation modelled thereon, by as many States as possible.

2. *Useful additions to the UNCITRAL Model Law on International Commercial Arbitration*

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The United Nations developed a family of laws and rules of international commercial arbitration. From the beginning of the work of UNCITRAL, arbitration was on the priority list of its work. The first piece of the series of laws, model laws and rules concerning arbitration was passed before the creation of UNCITRAL, and this was the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The New York Convention has a very important role in UNCITRAL's work concerning arbitration. It was taken as a cornerstone, and all the subsequent pieces of work were based on it. UNCITRAL did a lot of work relating to the New York Convention. It enhanced the ratification procedure. It is monitoring the practical application of the New York Convention, which is very important, and in due time it will take action if necessary. So after 25 years, I regard the New York Convention as it is now, together with its practical application, as an achievement not only of the United Nations, but also of UNCITRAL.

The later pieces, the UNCITRAL Arbitration Rules and the UNCITRAL Model Law on International Commercial Arbitration, together show a very strong interrelationship between those laws and rules. So when making any changes, when considering useful additions, one has to consider not only their impact on the application of one piece of the system, but also the implications for the whole system.

The first question that I wish to address is the following: Is there a necessity to amend the text of the Model Law on Arbitration, based on the practice of the last seven years? I might tell you that in my analysis the final answer will be a firm no. Another question distinct from this is as follows: In national parliaments as they adopt laws on international arbitration, is there a need, or is there a possibility, or is it useful to add to the already existing texts. Here you will see that my answer will be yes, but under certain conditions.

First one has to address the following problem: Is the UNCITRAL Model Law adequately addressing all the questions which a law should address on international, commercial arbitration? You might approach this problem from two angles. If you compare the volume, the quantity, of provisions of the UNCITRAL Model Law with existing national laws, you might come to the conclusion that perhaps the UNCITRAL Model Law is too long, that it has too many paragraphs and too many provisions compared with other existing laws. I think the comparison is not justified because other existing laws on international commercial arbitration or on arbitration in general, are embedded in a certain system of civil procedure, in a national system, and it is sometimes not necessary to make a complete set of rules and provisions as may be found in the UNCITRAL Model Law.

But there is another approach as well. A distinguished Swedish scholar, Gillis Wetter, constructed a list of questions which according to his approach should be addressed by a modern law or a model