4 The New York Convention: Its Intended Effects, Its Interpretation, Salient Problem Areas

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I. Introduction

The New York Convention is generally regarded as the most successful international convention in the field of international private law. This becomes readily apparent if one looks at the numbers: today 106 nations have adhered to the Convention. The Convention has been interpreted and applied in more than 700 court decisions coming from over 35 Contracting States, as reported in the *Yearbook Commercial Arbitration*. The results are likewise impressive: the courts have largely supported the Convention. In fact, in less than 5% of the cases, enforcement of an arbitral award has been refused.

Where does this success come from? Three main reason may be mentioned.

First, the structure and text of the Convention itself. It is easy to follow for a party seeking enforcement: he simply needs to request enforcement and submit the arbitral award and arbitration agreement only. That entitles him to a leave for enforcement unless the respondent

The case concerns Iran/US Claims Tribunal. On 17 May 1985, the Tribunal held a pre-hearing conference to consider, *inter alia*, whether voluminous and complicated data should be presented through summaries, tabulations, charts, graphs or extracts in order to save time and costs. Neither counsel for the Iranian parties nor the Iranian judge attended the conference. AVCO's counsel requested guidance from the Tribunal as to the appropriate method for proving certain of its claims which were based on voluminous invoices. The Swedish Chairman stated "I do not think we will be very, very much enthusiastic getting kilos and kilos of invoices" and suggested that an account be made by an internationally recognized public accounting firm. This is what AVCO did and it retained Arthur Young which verified that the accounts receivable ledgers submitted to the Tribunal accurately reflected the actual invoices in AVCO's records. On 16-17 September 1986, a hearing was held. At this point in time, the Swedish Chairman had resigned, having suffered from physical attacks by Iranian co-arbitrators. He was replaced by a French Chairman. At that hearing, the Iranian arbitrator also showed up. At a certain point during the hearing, the Iranian arbitrator asked where were the invoices. AVCO's counsel answered that this matter had been dealt with at the pre-hearing conference. The matter was not explored further by the Iranian or other arbitrators at the hearing. In the award of 18 July 1988, the majority of the Tribunal rejected AVCO's claims stating:

> "The Tribunal cannot grant AVCO's claims solely on the basis of an affidavit and a list of invoices, even if the existence of the invoices was certified by an independent audit."

The American arbitrator (Charles Brower) dissented, stating that the Tribunal had misled AVCO. The Iranians sought enforcement in the United States. The District Court, in its decision of 10 December 1991, declined to enforce the award because AVCO was denied the right to introduce certain evidence before the Tribunal. The Court of Appeals affirmed the decision of the District Court. The Court of Appeals reasoned in pertinent part:

> "At the pre-hearing conference, Judge Mangard specifically advised AVCO not to burden the Tribunal by submitting 'kilos and kilos of invoices'. Instead, Judge Mangard approved the method of proof proposed by AVCO, namely the submission of AVCO's audited accounts receivable ledgers. Later, when Judge Ansari [the Iranian Judge] questioned AVCO's method of proof, he never responded to AVCO's explanation that it was proceeding according to an earlier understanding. Thus, AVCO was not made aware that the Tribunal now required the actual invoices to substantiate AVCO's

III. Salient Problem Areas

My song on the Convention not only "hallelujah". There are indeed some problem areas in the Convention.

A. Enforcement of Arbitral Awards

1. No problem

Before identifying these areas, let me first engage in a process of demystification and tell you what - contrary to belief by some - are generally no problems in interpreting and applying the Convention.

What is not a problem with respect to enforcement of awards:

- Three main features of the grounds for refusal of enforcement mentioned in Article V:
  - *Grounds are exhaustive*
  - *No re-examination of the merits of the arbitral award*
  - *Burden of proof on respondent*
- Validity of the arbitration agreement, except Article II, but mostly at stage of referral to arbitration (discussed later)(Article V(1)(a))
- Due Process (Article V(1)(b))
- Excess by arbitrator of his authority (Art, V(1)(c))
- Irregularities in the appointment and procedure, even though it is a puzzling ground (Article V(1)(d))

4. Is a Problem

What is a problem with respect to enforcement of awards are awards made in France. This problem is caused by Article 1506 of the French New Code of Civil Procedure ("NCCP") which provides:

> "Le délai pour exercer les recours prévus aux articles 1501, 1502 et 1504 suspend l'exécution de la sentence arbitrale. Le recours exercé dans le délai est également suspensif."

(translation:

> "Enforcement of the arbitral award is suspended during the time limit for exercising the means of recourse defined in Articles 1501, 1502 and 1504. The pendency of such an action brought within the time limit also has a suspensive effect.")

Article 1506 of the French NCCP provides that the initiation of the annulment (setting aside) proceedings suspends by operation of law enforcement of the award. No judicial intervention to this effect is possible (unlike, for example, in Switzerland or the Netherlands where enforcement of an award can be suspended by a court only).

Article 1506 of the French Code of Civil Procedure appears to cause problems for Article V(1)(*e*) of the New York Convention. This ground provides that enforcement of the award may be refused if the respondent (i.e., the Government) can prove that:

> "The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

In a number of decisions, the question is raised whether article 1506 of the French Code of Civil Procedure has the effect of suspending the award in terms of article V(1)(e) of the Convention. In one recent decision of the District Court in Columbia, *Creighton v. The Government of Qatar*, it led, in my view erroneously, to the refusal of enforcement. I will not go into this matter as Jan Paulsson will address it. Suffice to make the following observations.

B. Arbitration Agreement

Here, there are two problem areas:

- which arbitration agreements qualify for referral to arbitration under article II(3) of the Convention? i.e., field of application for referral to the arbitration
- when is an arbitration agreement in writing?

1. Field of Application - Article II(3)

The Convention contains two actions:

- enforcement of foreign arbitral award (Arts. I and III-IV), and
- referral to arbitration (Article II(3))

The Convention specifies which arbitral awards can be enforced under it. On the other hand, it does not specify which arbitration agreements qualify for referral to arbitration pursuant to Article II(3). The Convention is in fact totally silent. This omission is due to the last minute insertion of Article II in the Convention at the New York Conference in 1958. Hence, the implementing legislations and courts had to resolve this omission.

An example is your Tribunal Fédéral which, in a recent case decided on 16 January 1995, was faced with the request to refer, on the basis of Article II(3) of the Convention, to arbitration in London a dispute between a Swiss and a French party. The Tribunal Fédéral considered the applicability of the Conventions as follows:

> "Both France and Switzerland, the countries in which the parties to the proceedings have their seat, as well as Great Brittain, the country of the chosen seat of the arbitral tribunal according to the standard conditions in the bill of lading, are Parties to the [New York Convention]. It is undisputed that the Convention applies to the present case. . . ."

Two other categories of arbitration agreements 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. To submit to you a *question brulante* in your country: if international arbitration is to take place in, say, Zurich or Geneva, is the form of the arbitration agreement to be determined according to Article II(2) of the Convention or the more liberal article 178(1) LDIP? And does the answer to this question depend on whether it is examined by a Swiss court or arbitrators? Here, I feel to be caught between two of your imminent scholars Professor Poudret and Professor Bucher.

On danger of losing a friend, let me give you my views. It is clear that Article II(2) does not apply to purely domestic arbitration agreements. Possible criteria for the application of Article II(2) 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.

However, the implementing acts and the courts differ with respect to the application of these criteria. I may briefly review some of these acts and courts.

The Italian courts seems to be of the opinion that Article II(3) applies only to agreements which provide for "foreign arbitration". This appears also to be the opinion of Professor Poudret and a number of other Swiss authors who maintain that the written form of the arbitration agreement providing for international arbitration in Switzerland is governed by the more liberal article 178 LDIP and not Article II(2) of the Convention (Poudret, *Le droit de l'arbitrage interne et international* [p. 285).

This point is approached differently in the United Kingdom where Sect. 1(4) of the Arbitration Act 1975 provides that the arbitration agreement will fall under the Convention (a) if the agreement provides for arbitration abroad (i.e., outside the United Kingdom) without any requirement as to the nationality of the parties, or (b) if the agreement provides for arbitration within the United Kingdom when at least one of the parties is non-British.

The implementing legislation in the United States provides that an arbitration agreement falls under the Convention as soon as at least one of the parties is non-American, irrespec-

2. Written Form of the Arbitration Agreement - Article II(2)

Article II(2) offers the two alternatives:

- The first alternative of Article II(2) requires that the contract including the arbitration clause, or the separate arbitration agreement, be signed by the parties.

- To allow for the practices in international trade, the second alternative was added. This alternative provides that it is sufficient that the contract including the arbitration clause, or the separate arbitration agreement, be contained in an exchange of letters or telegrams, with no requirement that any of these documents be signed by the parties.

(a) What is not a problem.

Signatures If a contract containing the arbitration clause is included, or the separate arbitration agreement is signed by the parties, the first alternative of Article II(2) is satisfied. In the case of the second alternative, the signatures of the parties are not required, provided that the arbitration agreement has been subject to an exchange in writing between the parties.

Telex and facsimile It is generally accepted that the expression in Article II(2) "contained in an exchange of letters or telegrams" should be interpreted broadly to include other means of communication, particularly telexes (to which facsimile could nowadays be added). This is expressly provided in Article I(2)(*a*) of the European Convention on International Commercial Arbitration of 1961, which is in part almost identical to Article II(2) of the New York Convention. The relevant proviso in the European Convention of 1961 states: "contained in an exchange of letters, telegrams, or in a communication by teleprinter".

This teleological interpretation is also affirmed by your Tribunal Fédéral in *Tracomin vs. Sudan Oil Seeds*, where your court simply stated that "the exchange of telexes must be assimilated to the exchange of telegrams" (*Tracomin SA*

which is that a party is aware that he is agreeing to arbitration, and by adopting the test for determining whether that purpose is fulfilled, i.e., that the reference can be checked by a party exercising reasonable care. Accordingly, a reference to standard conditions in the body of the contract is needed in any case. If the standard conditions are set out on the reverse side of the contract, a general reference to the conditions will suffice. If the standard conditions are contained in a separate document, the reference clause must draw specific attention to the arbitration clause. However, in the latter case a general reference will suffice if the standard conditions have been communicated to the other party. Finally, it is not necessary that the conditions are communicated to the other party for each transaction (the trading relationship).

This is, for example, very much the way in which your Tribunal Fédéral approaches this question. See Tribunal Fédéral, *Tradax vs. Amoco*, *Tradax Export SA v. Amoco Oil Company (formerly Amoco Overseas Oil Company* 7 February 1984, Yearbook Commercial Arbitration, XI (1986) Switzerland no. 8 sub 8-12.

The Italian courts, and especially the Italian Supreme Court, have emphasized the uniform rule character of Article II(2), which as a *lex specialis* supersedes municipal law including Arts. 1341 and 1342 of the Italian Civil Code.

In any event, you may be surprised to learn that the cases involving an arbitration clause in standard conditions lead to refusal of referral to arbitration or enforcement in a few cases only.

(c) What is a problem: Exchange of Letters or Telegrams

According to the second alternative of article II(2) of the Convention, the arbitration clause must have been the object of an exchange. A tacit acceptance is in principle not sufficient

The courts in the Contracting States express different views as to when the exchange can be deemed accomplished. One view is that the document itself

It appears that the Court of Appeals' opinion departs from what is required by the text of the Convention which excludes an oral or tacit acceptance of an arbitration agreement, at least in the manner in which it is interpreted in the majority of court decisions. The Court was apparently inspired by Section 32 of the English Arbitration Act 1950 under which an oral or tacit acceptance is sufficient.

A typical example of a case that does not satisfy Article II(2) of the Convention is *Marc Rich vs. Italimpianti* (also known as the *Atlantic Emperor*), decided by the Italian Supreme Court. In that case, the parties had concluded a contract concerning the purchase of Iranian crude through an exchange of telexes. After conclusion of the transaction by telex, Marc Rich sent further telex that included an arbitration clause. *Italimpianti* did not reply to this telex. The Italian Supreme Court held that the arbitration clause did not satisfy the Convention (*Marc Rich & Co AG (Switz) vs. Italimpianti SpA (Italy)*, 25 January 1991, YB XVII (1992) Italy no. 116 sub 6-8).

It follows from what is observed about the exchange requirement above that an arbitration clause in a sales or purchase confirmation will meet the written form requirement of Article II(2) only if:

(a) the confirmation is signed by both parties (first alternative); or

(b) a duplicate is returned, whether signed or not (second alternative); or, possibly,

(c) the confirmation is subsequently accepted by means of another communication in writing from the party who received the confirmation to the party who dispatched it.

In particular, a tacit acceptance of the confirmation is not sufficient for the purposes of Article II(2). And this is no longer in accord with international trade practices.

Second, at the Vienna Conference of 1985, the view prevailed that the Uncitral Model Law should faithfully follow the New York Convention and not depart from it. Hence, article 7(2) merely reflects the current interpretation of Article II(2) of the Convention but is not intended to add anything to it. At the beginning of this lecture, Mr. Kaplan observes:

> "[A]fter nearly five years of applying the Model Law in Hong Kong in my former judicial capacity, I found that the problems arising from the application of Article 7(2) of the Model Law were the most difficult and frustrating which came before me."

However, near the end he states that there have been several cases in Hong Kong where the court has had to consider the scope of Article 7(2) of the Model Law, but that there is only one of which Mr. Kaplan is aware where the writing requirement was clearly not complied with. In some cases the court was able to consider that there was sufficient material before it which would give rise to an arguable case of compliance with article 7(2) and leave the jurisdictional issue to the arbitrators under the regime set out in article 16 of the Model Law (that is another Swiss *question brulante*). Although it remains to be seen what the arbitrators will do with these cases, it seems that the question of the writing requirement is not so dramatic in practice as it is sometimes represented to be.

Second solution: Do not apply article II(2) at level of enforcement of award

This is the Italian solution. The Italian Supreme Court held in a case decided in 1980 that Article II(2) is applicable at the stage of enforcement of the arbitration agreement under Article II(3) only, but not at the stage of the enforcement of the arbitral award. However, except for the Italian Supreme Court, no court has doubted that the words "the agreement referred to in article II" in ground *a* of Article V(1) imply that the lack of the written form of the arbitration agreement as required by Article II(2) constitutes a ground for refusal of enforcement of an arbitral award. Moreover, in a number of subsequent decisions the Italian Supreme Court did apply Article II(2) in proceedings concerning the enforcement of arbitral awards. Consequently, this is not a real solution.

arbitral awards. The writing requirement then may become a casino, depending on the country where referral or enforcement is sought.

The third solution seems to be the preferred one. However, although my thinking about the interpretation of writing requirement of article II(2) of the Convention is in a state of evolution, I have not (yet) reached the stage that I adhere to the "no minimum requirement" interpretation. In any event, the question should not be exaggerated as in practice, it is mainly limited to sales confirmations that are sent after the fact and in which estoppel does not play a role.

IV. Concluding Remark

In my view, the above problems do not warrant the trouble of drafting and concluding a new Convention or Protocol. This question is to be distinguished from question of the Implementing Acts. They need to be made uniform and may be used for modernizing certain interpretations (see Dr Herrmann's lecture).

One final observation It appears that the judges and practising lawyers in the various States that have recently adhered to the Convention are in need of being informed of the practical aspects of applying the Convention. I believe that, rather than concentrating on modifying the Convention by a more sophisticated text - which in turn may give rise to fresh questions of interpretation - we should focus on the educating judges and lawyers in many of the 106 Contracting States on the existing Convention. With its imperfections, that text has proven to work rather satisfactorily for almost 40 years.

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