Modernizing and Simplifying the Multilateral Instruments in International Arbitration*

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I. INTRODUCTION

THE QUESTION THAT WE ARE EXAMINING today is whether arbitration needs to be adapted to the changing world. I have been tasked to address that question with respect to what the organizers call "Multilateral Instruments," which can be identified as "Arbitration Conventions." The short answer to the question is: yes. And I think that the mission statement would be "Simplify and Modernize."

Before I explain the mission statement, let me reassure you that I will not propose a "Hypothetical Draft of a New Washington Convention" that some may have feared after the ICCA Congress in Dublin in 2008. Simplification and modernization can be achieved through the various rules adopted under the Washington Convention.[1] The possible change of rules is the domain of the next speaker. And being a Convention that provides for a self-contained system of international arbitration, it is "*hors catégorie*."

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[1] Convention on the Settlement of Disputes Between States and Nationals of Other States (Mar. 18, 1965) (entered into force Oct. 14, 1966), 575 U.N.T.S. 160 (hereinafter Washington Convention), *available at* http://icsid.worldbank.org.

II. SIMPLIFICATION

Let us examine the first part of the mission statement: "Simplify." Here, I propose to reduce the number of international conventions in the field of arbitration, so that next to the Washington Convention only one arbitration treaty remains.

There are numerous regional treaties in the field of arbitration. Some of them seem to be the result of a conference which the delegates believed could be considered successful only if they came home with an official-looking document called a treaty. The proliferation of regional treaties is particularly prevalent in the Middle East and Latin America. I will not review all regional conventions—many of them are dead letters—but I would like to mention two that are referred to in practice from time to time.

A. European Convention of 1961

The first is the European Convention on International Commercial Arbitration of 1961,[2] also called the Geneva Convention. There is no future for this Convention. It is a prime target for abolition. The European Convention is a product of the Cold War, as is reflected in Article IV and the Paris Protocol on arbitral proceedings. Article IV is highly complex and almost never applied in practice.

The field of application is not trouble-free either. While the European Convention requires that the parties come from different States that are Parties to the Convention, it does not require that the arbitration take place or the award be rendered in a Contracting State. This has led to a remarkable decision of the Italian Supreme Court denying enforcement of an arbitral award made in London.[3] The field of application of the European Convention has given rise to considerable confusion amongst the courts in the Contracting States. They are struggling with it and regularly get it wrong.

Most of the other provisions of the European Convention are outdated. The UNCITRAL Model Law of 1985[4] offers more modern equivalents.

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[2] European Convention on International Commercial Arbitration (April 21, 1961) (entered into force Jan. 7, 1964), 484 U.N.T.S. 349 (hereinafter European Convention), *available at* http://www.jurisint.org/doc/html/ins/en/2002/2002jiinsen6.html.

[3] *Fratelli Damiano s.n.c v. August Tropfer* & *Co.*, Case No. 722 (Corte de Cassazione, Feb. 8, 1982) (Italy), XVIII Rivista di diritto internazionale private e processuale 329 (1983), *reprinted in* IX Y.B. Comm. Arb. 418 (1984).

[4] UNCITRAL Model Law on International Commercial Arbitration (June 21, 1985) (as amended 2006) (hereinafter UNCITRAL Model Law), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

It is said that the European Convention's Article II is helpful as it provides that "legal persons considered by the law that is applicable to them as 'legal persons of public law' have the right to conclude valid arbitration agreements." That provision was referred to in one published award although it was not determinative there.[5] Most countries that are Parties to the European Convention already have enacted that right in one way or another.

The only useful provision that one can find in the European Convention is Article IX, which contains a limitation on the right to invoke the grounds for refusal of enforcement listed in Article V of the New York Convention.[6] The limitation concerns the ground that the award has been set aside in the country where it was made, as provided in Article V(1)(e) of the New York Convention, under which such a setting-aside can be effected on any ground set out in the arbitration law of that country. According to the European Convention's Article IX(2), "[i]n relations between Contracting States that are also Parties to the New York Convention," enforcement may be refused when the award has been set aside in the country where the award was made, but only if the award has been set aside on one of the grounds listed in Article IX(1)(a)-(d). These grounds are substantially similar to the grounds for refusal of enforcement mentioned in Article V(1)(a)-(d) of the New York Convention. One of the reasons for this limitation was to exclude a setting aside in the country of origin for reasons of that country's public policy. It should be emphasized that this is only a limitation of the second part of Article V(1)(e) of the New York Convention. The other grounds for refusal may still be invoked by the party against whom enforcement is sought.

It should be noted that Article IX(1) mentions "the setting aside in a Contracting State." The limitation of Article IX seems therefore not to be applicable if the award has been set aside in a State which is not a Party to the European Convention. This makes the scheme rather complex since, as mentioned above, while the European Convention requires that the parties come from different States that are Parties to the Convention, it does not require that the arbitration take place or the award be rendered in a Contracting State.

Another remarkable aspect of Article IX is that it applies only within States Parties to the European Convention. Accordingly, if an award has been set aside in a State Party to the European Convention, its enforcement cannot be refused under the New York Convention in other States Parties to the European

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[5] *Dipl. Ing. Erick Benteler KG and Helmut Benteler KG v. Belgian State and S.A. ABC*, Interim Award (Nov. 18, 1983), 1 J. Int'l Arb. 184 (1984), *reprinted in* X Y.B. Comm. Arb. 37 (1985).

[6] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (June 10, 1958) (entered into force June 7, 1959) 330 U.N.T.S. 3 (hereinafter New York Convention), *available at* http://www.uncitral.org/pdf/07-87406_Ebook_ALL.pdf.

Convention. However, if enforcement of the same annulled award is sought in a New York Convention country that is not a Party to the European Convention (and there are many of them), enforcement is to be refused under Article V(1)(e) of the New York Convention. It is submitted that this inconsistency is a typical result of a regional approach to international conventions and would not have arisen under a global approach as currently advocated by UNCITRAL.

Article IX is not a reason to retain the European Convention. Rather, it is a model for modernization of the New York Convention, about which more later.

B. Panama Convention of 1975

The other regional convention that I would like to mention in the framework of simplification is the Inter-American Convention on International Commercial Arbitration of 1975,[7] also called the Panama Convention. The Panama Convention is modeled after the New York Convention, although not entirely. Since the drafting of the Panama Convention, almost all Latin American countries have also adhered to the New York Convention. Why maintain the Panama Convention? That question is justified, and applies more forcefully if one considers the following aspects of the Panama Convention.

The Panama Convention does not define its field of application. As regards the enforcement of arbitral awards, it may be inferred from its Article 5, which is almost identical to Article V of the New York Convention, that the Panama Convention applies to awards made in another State. The word "Inter-American" in the title suggests that the foreign State where the award is made must be a Contracting State. Taking again into account the title of the Convention, the award must presumably also relate to an international transaction. Whether it is a condition for the field of application that the parties be subject to the respective jurisdictions of different Contracting States is unclear.

The Panama Convention shows further *lacunae* in comparison with the New York Convention. Besides the faulty definition of its field of application, it fails to provide, *inter alia*, for actions to enforce the arbitration agreement,[8] enforcement procedures,[9] and the conditions to be fulfilled by the party seeking enforcement.[10] Moreover, it is unclear whether, in the case of an arbitral clause

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[7] Inter-American Convention on International Commercial Arbitration (Jan. 30, 1975) (entered into force June 6, 1976), O.A.S.T.S. No. 42, 1438 U.N.T.S. 249 (hereinafter Panama Convention), *available at* http://treaties.un.org/doc/Publication/UNTS/Volume%201438/volume-1438-I-24384-English.pdf.

[8] *Cf.* New York Convention, *supra* note 6, art. II(3).

[9] *Cf. id.*, art. III.

[10] *Cf. id.*, art. IV; *but see* Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (May. 8, 1979) (entered into force June 14, 1980), O.A.S.T.S. No. 51, 1439 U.N.T.S. 91, *available at* http://untreaty.un.org/unts/60001_120000/22/28/00043359.pdf.

referring future disputes to arbitration, the parties are still obliged to conclude a submission agreement once the dispute has arisen, a requirement imposed by some Latin American arbitration laws.

A rather unusual treaty provision, which has no counterpart in the New York Convention, is to be found in the Panama Convention's Article 3: "In the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission." The IACAC Arbitration Rules, as amended in 1978, are virtually identical to the UNCITRAL Arbitration Rules of 1976. The legislation implementing the Panama Convention in the United States has frozen the applicable version of the IACAC Rules to the one of 1978, unless the Secretary of State prescribes otherwise.[11] The U.S. Department of State has determined that the IACAC Rules as amended in 2002[12] should become effective in the United States.[13] Doubt remains, however, over whether the IACAC Rules prevail over local arbitration law in view of the provisions of Article 5(1)(d) of the Panama Convention (which is literally the same as Article V(1)(d) of the New York Convention). Furthermore, the purported supremacy of the IACAC Rules may be jeopardised by a provision in the Rules themselves. Article 1(2) provides: "These Rules shall govern the arbitration, except that where any such rule is in conflict with any provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail."

When enforcement of an award made in another State is sought, the award may fall under both the New York and Panama Conventions. Such a situation may, for instance, arise if the award is made in a State which is Party to both Conventions. Similarly, if an arbitration agreement is invoked in court proceedings brought in violation of that agreement, both Conventions may be applicable. In these situations, the question may arise as to which Convention is to be applied. The relevance of this question is twofold. First, the New York Convention provides a clearer regulation for the enforcement of foreign arbitral awards, and for referral to arbitration, than the Panama Convention, which, as mentioned above, contains a number of *lacunae*. Second, if the Panama Convention applies, the IACAC Rules are to be followed unless the parties have agreed on the appointment of the arbitrators and the arbitral procedure.

To my knowledge, only the United States' implementing legislation fills the numerous gaps in the Panama Convention.[14] But also here, the courts

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[11] 9 U.S.C. § 306 (2007).

[12] Rules of Procedure of the Inter-American Commission on Commercial Arbitration (as amended Apr. 1, 2002), *available at* http://www.adr.org/sp.asp?id=22093.

[13] 22 C.F.R. § 194.1 (2009).

[14] 9 U.S.C. § 301 *et seq.* (2007).

have considerable difficulties in determining the Panama Convention's field of application.[15]

Both the European Convention of 1961 and the Panama Convention of 1975 fall under the category: "No need and no future." We can simplify our increasingly complex world by abolishing them. I would add to these a number of other regional conventions in the field of arbitration.

C. EC Regulation 44/2001

In our complex world, some things are still simple, such as the European Community Council Regulation 44/2001,[16] formerly known as the Brussels Judgments Convention of 1968. Article 1, section 1(d) excludes arbitration from its field of application. That exclusion was explained at the time by reference to the New York Convention. Dark clouds are now on the horizon that may make international arbitration life within the EU exceedingly complex. The EC Commission commissioned from three German law professors (Prof. Dr. B. Hess, Prof. Dr. T. Pfeiffer, and Prof. Dr. P. Schlosser) a general study on the practical application of Regulation 44/2001, which was released in September 2007.[17] In its Report on the application of Regulation 44/2001, the EC Commission summarized the findings in the study as follows:

> The study shows that the interface between the Regulation and arbitration raises difficulties. In particular, even though the 1958 New York Convention is generally perceived to operate satisfactorily, parallel court and arbitration proceedings arise when the validity of the arbitration clause is upheld by the arbitral tribunal but not by the court; procedural devices under national law aimed at strengthening the effectiveness of arbitration agreements (such as anti-suit injunctions) are incompatible with the Regulation if they unduly interfere with the determination by the courts of other Member States of their jurisdiction under the

[15] *See* J. Bowman, "The Panama Convention and its Application Under the Federal Arbitration Act," 11 Am. Rev. Int'l Arb. 116 (2000); *see also* J. Jackson, "The 1975 Inter-American Convention on International Commercial Arbitration: Scope, Application and Problems," 8 J. Int'l Arb. 91 (1991); A.J. van den Berg, "The New York Convention 1958 and Panama Convention 1975: Redundancy or Compatibility?" 5 Arb. Int'l 214 (1989).

[16] Council Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Dec. 22, 2000), 2001 O.J. (L 12) 1 (EC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:012:0001:0023:EN:PDF.

[17] B. Hess, T. Pfeiffer and P. Schlosser, "Report on the Application of Regulation Brussels I in the Member States," Study No. JLS/C4/2005/03 (Ruprecht-Karls-Univesität Heidelberg 2007), *available at* http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc/study_application_brussels_1_en.pdf; *see* in particular pp. 49–65.

> Regulation; there is no uniform allocation of jurisdiction in proceedings ancillary to or supportive of arbitration proceedings; the recognition and enforcement of judgments given by the courts in disregard of an arbitration clause is uncertain; the recognition and enforcement of judgments on the validity of an arbitration clause or setting aside an arbitral award is uncertain; the recognition and enforcement of judgments merging an arbitration award is uncertain; and finally, the recognition and enforcement of arbitral awards, governed by the NY Convention, is considered less swift and efficient than the recognition and enforcement of judgments.[18]

Following the above Report, the EC Commission issued a "Green Paper" on the review of Regulation 44/2001.[19] The Green Paper asked questions as to the appropriate action to be taken at the Community level: to strengthen the effectiveness of arbitration agreements; to ensure a good coordination between judicial and arbitration proceedings; or to enhance the effectiveness of arbitral awards? In my view, all are unnecessary.

III. MODERNIZATION

If we can do away with the regional arbitration conventions, there is one global convention left: the New York Convention. The question is whether the New York Convention is in need of modernization. I believe so, as I have attempted to show with the hypothetical Draft Convention presented in Dublin in 2008 (attached as an annex to this article).[20]

Before addressing the Draft Convention, I would like to make three preliminary points.

First, at a good dinner in France, my friend Johnny Veeder gave a dinner speech in which he suggested that I had drafted the Convention in order to

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[18] Commission Report on the Application of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM (2009) 174 final (Apr. 4, 2009), at 9, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0174:FIN:EN:PDF.

[19] Commission Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM (2009) 175 final, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0175:FIN:EN:PDF.

[20] A.J. van den Berg, "Text of the Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards," Annex I of Keynote Address at the 19th ICCA Congress: 50 Years of the New York Convention, Dublin (June 2008), ICCA Congress Ser. No. 14, at 667 (A.J. van den Berg ed., Kluwer 2009) (hereinafter Draft Convention), *available at* http://www.arbitration-icca.org/media/0/12133674097980/hypothetical_draft_convention_ajbrev06.pdf.

escape writing a second edition of my book on the New York Convention. I would like to dispel the rumor by simply pointing out the website that I created regarding the New York Convention.[21]

Second, my concern is not that the Convention has become dysfunctional at present. The Convention is still a cornerstone of international arbitration. My concern is rather that success makes us complacent and actually becomes an enemy of progress. I believe that we should start thinking about amending or replacing the Convention now, rather than wait.

Third, as I have already mentioned, at the occasion of the ICCA Congress in Dublin in June 2008, I undertook the exercise of drafting a hypothetical Convention with the purpose of finding out whether the New York Convention was still up to date. My conclusion was that the New York Convention indeed needed to be modernized. As I expected, there was opposition. To my surprise, this came particularly from the French side. One would have thought that they would support an amended Convention, as the French courts have not applied the present Convention for years because they seem to find it an inferior text. The French commentator at the ICCA Congress argued that judges should instead be educated about the present New York Convention. My response was that education presupposes a clear text. I think that it is no longer the case with the present Convention, however. I hope to demonstrate this with a limited comparison between the texts of the existing New York Convention and the hypothetical Draft Convention.

Article 1 – Field of Application

The Draft Convention could be clearer than the New York Convention by having an object and purpose aimed specifically at *international* arbitration, like the 1985 Model Law of UNCITRAL.

You will note the first paragraph of the Draft Convention, for which there does not exist a comparable provision in the present New York Convention. This is a gaping hole. The New York Convention does not contain a definition as to which arbitration agreements fall under the referral provisions of its Article II(3).

The definition in the Draft Convention requires in essence that the arbitration agreement concern international arbitration. The broad criteria for determining international arbitration as set forth in Article 1(1) of the Draft Convention are a condensed version of the definition set forth in Article 1 of the UNCITRAL Model Law.

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[21] *See* New York Arbitration Convention, http://www.newyorkconvention.org.

The second paragraph concerning the arbitral award fits seamlessly with the first.

Under the Draft Convention's approach, the arbitration is treated in a uniform manner for the purposes of the Draft Convention's field of application. This remedies another shortcoming of the New York Convention, under which it can happen that the arbitration agreement is held to fall under the referral provisions of that Convention's Article II(3), while the arbitral award does not come within the Convention's field of application (*e.g.* the award is made within the country where enforcement is sought).

Article 2 – Enforcement of Arbitration Agreement

The first paragraph of the Draft Convention sets forth the general obligation of the courts in the Contracting States to enforce arbitration agreements by means of referral to arbitration. It can be compared with Article II(3) of the New York Convention.

The second paragraph of Article 2 contains a limited list of circumstances under which a court shall not refer the dispute to arbitration. Such an express provision is lacking in the New York Convention.

Ground (a) of paragraph 2 establishes that the arbitration agreement is to be invoked before submitting a statement on the substance of the dispute. (In ordinary cases these actions are taken by the defendant.) It is another provision that is lacking in the New York Convention but can be found in most arbitration laws.[22]

Ground (b) of paragraph 2 addresses a major problem with the New York Convention. Article II(1) of the New York Convention requires a written form for the arbitration agreement, which Article II(2) defines as including "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." The requirement of a written form is more stringent than the terms imposed by virtually all modern arbitration laws. Article II(2) leads to so-called "silent premature death" arbitration enforcement cases. When we talk about refusals of enforcement of around 10%, these concern refusal to enforce the arbitral *award*. Those are well documented.[23] What has not yet been examined is how many requests for referral to arbitration under Article II(3) have been refused by the courts of the

[22] *See, e.g.*, UNCITRAL Model Law, *supra note* 4, art. 8(1).

[23] *See* A.J. van den Berg, "New York Convention of 1958: Refusals of Enforcement," 18 ICC Int'l Ct. Arb. Bull. 1 (2007); A. van den Berg, "Refusals of Enforcement under the New York Convention of 1958: the Unfortunate Few," *in* Arbitration in the Next Decade, 10 ICC Int'l Ct. Arb. Bull. (Special Supplement) (1999).

Contracting States. Referral cases constitute approximately 50% of the 1,500 cases reported under the Convention.

In any event, the stringent requirements of Article II(2) regarding the written form of the arbitration agreement prompted UNCITRAL to issue a "Recommendation Regarding the Interpretation" in 2006.[24] UNCITRAL therein suggested to have Article II(2) applied "recognizing that the circumstances described therein are not exhaustive." This interpretation, however, has its limits, as the text of Article II(2) requires either a signed contract or a written exchange, which excludes less formal ways of acceptance.

It is submitted that requirements for the form of the arbitration agreement are no longer needed. Actually, modern arbitration laws are gradually abandoning the written form requirement, treating the arbitration clause on the same footing as other clauses in a contract.[25] The Draft Convention follows this trend by no longer imposing an internationally required written form.

The New York Convention does not contain a rule on conflict of laws for determining the law applicable to the arbitration agreement at the stage of referral to arbitration. The absence of such a rule has given rise to diverging judicial interpretations, with identified rules ranging from the law of the forum to the law where the award will be made or likely made. The Draft Convention retains the latter conflict rule since it will lead to the same law as governs the arbitration agreement at the stage of the arbitral award's enforcement.[26]

Article 3 – Enforcement of Award – General

Article 3 of the Draft Convention follows Article III of the New York Convention. There are a number of clarifications, which, in the interest of time, I will not discuss here.

I may point to a new paragraph 4 which deals with a serious problem under the New York Convention: in a number of Contracting States, the procedure for enforcing Convention awards is unacceptably slow. The Draft Convention stipulates that the courts must act expeditiously on a request for enforcement.

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[24] UNCITRAL Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, U.N. Doc. A/6/17/Annex II (July 7, 2006), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf.

[25] *See* the discussion at the thirty-ninth session of UNCITRAL in 2006, which resulted in alternative options for the definition and form of the arbitration agreement being provided in Article 7 of the UNCITRAL Model Law.

[26] *See* Draft Convention, *supra* note 20, art. 5(3)(a).

Article 4 – Request for Enforcement

The first paragraph makes clear that the conditions set forth in Article 4 of the Draft Convention are the only conditions that need to be met by the petitioner.

Unlike Article IV(1)(b) of the New York Convention, Article 4 of the Draft Convention does not oblige the party seeking enforcement of the award to supply a copy of the arbitration agreement, for reasons I explained above.

Article 5 – Grounds for Refusal of Enforcement

Article 5 is modeled after Article V of the New York Convention, albeit with a number of clarifications and adjustments.

The third paragraph contains a number of grounds that attempt to simplify those set forth in the New York Convention. I would like to mention one of them.

Ground (g) offers a solution that is inspired by the European Convention. The corresponding Article V(1)(e) of the New York Convention provides as a ground for refusal of enforcement that the award has been set aside on any ground in the country of origin.

Accordingly, refusal of enforcement is limited to cases where the award has been set aside in the country of origin on grounds equivalent to grounds (a) to (e) of Article 5(3) of the Draft Convention, which correspond in turn to generally recognized grounds for setting aside an arbitral award resulting from international arbitration.[27] The solution proposed in ground (g) of Article 5(3) of the Draft Convention means, in particular, that a setting aside on domestic public policy or parochial grounds in the country of origin is not a ground for refusal of enforcement.

This proposal does not follow the French solution. According to the French courts, the setting aside of an award in the country of origin is in no way a ground for refusing enforcement in France.[28] The French courts take that position without applying the New York Convention, relying instead on the more-favorable-right provision of Article VII(1) of the New York Convention.

With respect to the fifth paragraph, the New York Convention does not contain an express provision on the waiver of a right to invoke a ground for refusing enforcement. Some courts have interpreted the Convention as implying a discretionary power not to refuse enforcement if a party can be held to have

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[27] *See* UNCITRAL Model Law, *supra* note 4, art. 34(2)(a).

[28] *See, most recently*, *PT Putrabali Adyamulia v. Rena Holding*, Case No. 06-13.293 and *PT Putrabali Adyamulia v. Rena Holding*, Case No. 05-18.053 (Cass. 1e civ., June 29, 2007) (France); *see also* A.J. van den Berg, "Enforcement of Arbitral Awards Annulled in Russia – Case Comment on Court of Appeal of Amsterdam, April 28, 2009," 27 J. Int'l Arb., no. 2, at 179–198 (2010).

waived the right to rely on a ground for refusing enforcement. This is not an established interpretation, however. The interpretation is mainly based on the permissive expression, "enforcement may be refused," in the opening proviso of Article V(1) of the New York Convention in its authentic English text. The Draft Convention, however, employs the mandatory expression, "enforcement shall be refused," which would no longer permit the aforesaid interpretation.

Article 7 – More-Favorable-Right

Article 7 of the Draft Convention contains a more-favorable-right provision that is based on Article VII(1) of the New York Convention. The text of Article VII(1) of the New York Convention applies only to the enforcement of the arbitral award, and does not mention the arbitration agreement. UNCITRAL suggests in its "Recommendation Regarding the Interpretation" of 2006 that Article VII(1) "should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement." I find it difficult to read that in the text of Article VII(1). Rather, the interpretation should be codified as is done in Article 7 of the Draft Convention, which expressly refers to both the arbitration agreement and the arbitral award.

Conclusion

In conclusion, the technique of validating the New York Convention by drafting a hypothetical new Draft Convention would appear to reveal that the New York Convention is actually today in need of modernization.

Comments on the Draft Convention

A first comment is that the draft is too long. A word count shows, however, that it is actually shorter than the present New York Convention.

A second comment refers to the more-favorable-right provision in Article VII(1) of the New York Convention. It is said that the Convention contains a minimum standard and that States may be more liberal. That comment calls for two observations. The first is that the reference to "the law" in Article VII(1) of the New York Convention[29] is to be understood as referring to a statutory or

[29] *I.e.* "… deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent *allowed by the law* or treaties of the country where such award is sought to be relied upon." (Emphasis added.)

case law regime for the enforcement of foreign arbitral awards outside of a treaty. This also follows from the juxtaposition of "the law" with "the treaties," a term which cannot have any other meaning than treaties concerning the recognition and enforcement of foreign arbitral awards.

Some courts and commentators nevertheless interpret Article VII(1) expansively in the sense that the right of a party to avail itself of an arbitral award in the manner and extent allowed by its law is extended to the right that a party may have in respect of a domestic award. The result is, for example, that the written form is no longer assessed under Article II(2) of the Convention, but rather under the arbitration law of the forum. This interpretation was apparently followed by the U.S. District Court for the District of Columbia in *Chromalloy v. Egypt*.[30]

In two cases, the German Supreme Court took the position that Article VII(1) allows a German court on its own motion to rely on domestic law *in toto* if it is more favorable to enforcement of the foreign award. In the first case, this finding meant, according to the German Supreme Court, that the petitioner need not supply a copy of the arbitration agreement[31] as it was not a requirement of German arbitration law.[32] In the second case, the German Supreme Court observed that "a German court may rely on domestic law in its entirety that is more friendly to recognition, even if the parties do not rely thereon, since the court must take the law—international conventions as well as (original) domestic law—into account on its own initiative …."[33] The court further stated:

> The application of a national law that is more friendly to arbitration, pursuant to the more-favorable-right principle, does not only concern the provisions on the recognition and enforcement of arbitral awards (Sect. 1025 et seq. ZPO) … [I]t also includes the (national) conflict of laws provisions and the national law applicable to the arbitration agreement determined thereunder.[34]

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[30] *Chromalloy Aeroservices Inc. v. Arab Republic of Egypt*, Civ. No. 94-2339 (July 31, 1996), 939 F. Supp. 907 (D. D.C. 1996), *reprinted in* XXII Y.B. Comm. Arb. 1001 (1997).

[31] *See* New York Convention, *supra* note 6, art. IV(1)(b).

[32] Case No. III ZB 68/02 (Bundesgerichtshof, Sept. 25, 2003) (Germany), SchiedsVZ 281 (2003), *reprinted in* XXIX Y.B. Comm. Arb. 767 (2004); *see also K Trading Co. v. Bayerischen Motoren Werke AG*, Case No. 4Z Sch 005-04 (Bayerisches Oberstes Landesgericht, Sept. 23, 2004) (Germany), *reprinted in* XXX Y.B. Comm. Arb. 568 (2005); Case No. 29 Sch 1/05 (Oberlandesgericht, Hamm, Sept. 27, 2005) (Germany), 4 SchiedsVZ 106 (2006), *reprinted in* XXXI Y.B. Comm. Arb. 685 (2006).

[33] Case No. III ZB 18/05 (Bundesgerichtshof, Sept. 21, 2005) (Germany), 3 SchiedsVZ 306 (2005), *reprinted in* XXXI Y.B. Comm. Arb. 679, 682 (2006).

[34] *Id.* at 683.

I submit that such an interpretation creates great uncertainty as to which countries would or would not enforce an award.

The second observation is that the consequence of the aforesaid argument is that the New York Convention becomes irrelevant since enforceability becomes more and more dependent on national laws.

A third comment on the Draft Convention is that it relies too much on the place of arbitration. However, that is the generally accepted focus in international arbitration these days. The UNCITRAL Model Law incorporates it, the English Arbitration Act is based on it, and even French arbitration law is founded on the concept of territoriality insofar as international arbitral awards made in France are concerned. The rule also makes sense now that most countries have modern arbitration laws.

The third comment appears to be the only one made on the substance of the Draft Convention. The other comments are rather on the level of "if it ain't broke, don't fix it."

That brings me to the fourth comment, which is that there is no hope that the States Parties will agree on a modernization of the New York Convention. The self-proclaimed "*Realpolitikers*" point to the hostility of certain States to investment arbitration and bilateral investment treaties. They also point to some States that have denounced BITs and even the Washington Convention. The reality is, however, that we are talking here about 5 to 10 States. The question is whether these States should block the progress of international arbitration. Should the vast majority of States around the world that are in favor of the peaceful settlement of international business disputes by arbitration be taken hostage by a few States? You do not need to be a geopolitical expert to answer that question.

Thank you.

ANNEX

Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards

Article 1 – Field of Application

1. This Convention applies to the enforcement of an arbitration agreement if:

a. the parties to the arbitration agreement have, at the time of the conclusion of that agreement, their place of business or residence in different States, or
b. the subject matter of the arbitration agreement relates to more than one State.

3. This Convention applies also to the enforcement of an arbitral award based on an arbitration agreement referred to in paragraph 1.
4. Where this Convention refers to the enforcement of an arbitral award, it comprises the recognition of an arbitral award.

Article 2 –Enforcement of Arbitration Agreement

1. If a dispute is brought before a court of a Contracting State which the parties have agreed to submit to arbitration, the court shall, at the request of a party, refer the dispute to arbitration, subject to the conditions set forth in this article.
2. The court shall not refer the dispute to arbitration if the party against whom the arbitration agreement is invoked asserts and proves that:
   a. the other party has requested the referral subsequent to the submission of its first statement on the substance of the dispute in the court proceedings; or
   b. there is *prima facie* no valid arbitration agreement under the law of the country where the award will be made; or
   c. arbitration of the dispute would violate international public policy as prevailing in the country where the agreement is invoked.
4. The court may on its own motion refuse to refer the dispute to arbitration on ground (c) mentioned in paragraph 2.

Article 3 – Enforcement of Award – General

1. An arbitral award shall be enforced exclusively on the basis of the conditions set forth in this Convention.
2. The law of the country where enforcement is sought shall govern the procedure for enforcement of the award.
3. There shall not be imposed onerous requirements on the procedure for enforcement nor substantial fees or charges.
4. Courts shall act expeditiously on a request for enforcement of an arbitral award.

Article 4 – Request for Enforcement

1. Fulfillment of the conditions set forth in this article entitles the party seeking enforcement to be granted enforcement of the arbitral award, unless the court finds that a ground for refusal is present under the conditions set forth in articles 5 and 6.
2. The party seeking enforcement shall supply to the court the original of the arbitral award.
3. Instead of an original of the arbitral award, the party seeking enforcement may submit a copy certified as conforming to the original. The certification shall be in such form as directed by the court.
4. If the arbitral award is not in an official language of the court before which enforcement is sought, the party seeking enforcement shall, at the request of the other party or the court, submit a translation. The translation shall be in such form as directed by the court.

Article 5 – Grounds for Refusal of Enforcement

1. Enforcement of an arbitral award shall not be refused on any ground other than the grounds expressly set forth in this article.
2. Enforcement shall be refused on the grounds set forth in this article in manifest cases only.
3. Enforcement of an arbitral award shall be refused if, at the request of the party against whom the award is invoked, that party asserts and proves that:
   a. there is no valid arbitration agreement under the law of the country where the award was made; or
   b. the party against whom the award is invoked was not treated with equality or was not given a reasonable opportunity of presenting its case; or
   c. the relief granted in the award is more than, or different from, the relief sought in the arbitration and such relief cannot be severed from the relief sought and granted; or
   d. the composition of the arbitral tribunal was not in accordance with the agreement of the parties, or in the absence of such an agreement, not in accordance with the law of the country where the award was made; or
   e. the arbitral procedure was not in accordance with the agreement of the parties, or in the absence of such an agreement, not in accordance with the law of the country where the award was made; or

f. the award is subject to appeal on the merits before an arbitral appeal tribunal or a court in the country where the award was made; or
g. the award has been set aside by the court in the country where the award was made on grounds equivalent to grounds (a) to (e) of this paragraph; or
h. enforcement of the award would violate international public policy as prevailing in the country where enforcement is sought.

9. The court may on its own motion refuse enforcement of an arbitral award on ground (h) of paragraph 3.
10. The party against whom the award is invoked cannot rely on grounds (a) to (e) of paragraph 3 if that party has not raised them in the arbitration without undue delay after the moment when the existence of the ground became known to that party.

Article 6 – Action for Setting Aside Pending in Country of Origin

1. If the application for setting aside the award referred to in article 5(3)(g) is pending in the country where the award was made, the court before which the enforcement of the award is sought under this Convention has the discretion to adjourn the decision on the enforcement.
2. When deciding on the adjournment, the court may, at the request of a party, require suitable security from the party seeking enforcement or the party against whom the award is invoked.

Article 7 – More-Favourable-Right

If an arbitration agreement or arbitral award can be enforced on a legal basis other than this Convention in the country where the agreement or award is invoked, a party seeking enforcement is allowed to rely on such basis.

Article 8 – General Clauses

The General Clauses to be considered and possibly included in the Draft Convention include amongst others:

a. Designation of Competent Enforcement Court
b. Interpretation
c. Relationship with the New York Convention

d. References to the New York Convention in other treaties
e. Compatibility with other treaties
f. [No] reservations
g. General reciprocity
h. Applicability of the Draft Convention to territories and in federal states
i. Signature, ratification and accession, and deposit
j. Entry into force
k. Retroactive [in]applicability; transitional clauses
l. Denunciation
m. Notifications
n. Language of authentic texts.