"Is there a need to reform the New York Convention of 10 June 1958?"

I. Introduction

"If it ain't broke, don't fix it" was the phrase Professor Albert Jan van den Berg used 20 years ago at the 1998 ICCA annual conference to argue that it was not necessary to review or amend the New York Convention (from now on, the Convention).

Despite this, since ten years ago, the same Professor van den Berg is leading a movement seeking to review the Convention under the argument that: (i) specific provisions of it are outdated and, (ii) others are not clear, creating confusion at the time of interpretation of its articles.

This essay does not seek to point out that the Convention is perfect. It is clear that it has some "difficulties" to deal with, but in our opinion, it is not possible to affirm that because of them the Convention needs a reform/review. To prove this, we will analyze three of the supposed main problems that the Convention has: **first**, that the provision of an "agreement on writing" contained in Article II (2) is outdated **(II)**; **second**, that the discretion given by the "may" in article V (1) could be used unwisely **(III)**; and **third**, that the reference to public policy in Article V (2) (b) is not clear and generates confusion when interpreting it with Article V (2) (a) **(IV)**.

In my opinion, these "difficulties" can be solved in a less intrusive and more efficient way: through a correct and uniform interpretation of the terms of the Convention. As I will point out below, the 1958 New York Convention

Guide elaborated by UNCITRAL and directed by Professors Gaillard and Bermann is a fundamental tool for this purpose **(V)**.

II. Commercial reality v. literalness. Could we save Article II (2) of the Convention?

This section will develop that the judicial courts are correctly interpreting Article II (2), giving higher weight to the purpose of the Convention than to the express text of it.

It is not a secret that the text of Article II (2) of the Convention is a bit outdated. As international trade has developed, so has the complexity of disputes. Progress as the amendments to the definition of a written arbitration agreement contained in the UNCITRAL Model Law of 2006 reflects that arbitration has evolved since 1958.

According to the annual reports that the ICC publishes with its Dispute Resolution Bulletin (1997-2016), the percentage of new arbitrations administered by the above-mentioned institution where more than two parties have intervened (multiparty arbitration) has increased, passing from 19.9% of the new cases in 1997 to almost half of the new cases (42.9%) in 2016. Considering this background, the Convention must recognize the commercial reality of this era and allow the execution of awards that bounds non-signatory parties even if there is not an "agreement in writing" according to Article II(2).

From a review to the reported jurisprudence, only in the *Javor v. Francoeur et al.* case solved in 2003, a judicial court rejected the enforcement of an arbitral award where the arbitration agreement had been extended to a non-

signatory party (alter ego theory). In this case, the Supreme Court of British Columbia (Canada) denied the enforcement of the arbitration award against Francoeur, stating that "*Francoeur is not a named party to the arbitration agreement. He is not a signatory to the agreement in his individual capacity*". Fortunately, this type of decision has not become a trend.

For example, in the United States, in the *Sarhank v. Oracle Corporation* case solved in 2002, the District Court of New York executed an arbitration award where the arbitration agreement had been extended based on the alter ego theory. In 2004, in the *Flexi-Van Leasing v. Throught Transport* case, the Court of Appeals of the Third Circuit of the United States executed an arbitration agreement and sent to arbitration a dispute in which the theory of the third beneficiary was used. In 2012, in the *Formostar, LLC, et al. v. Henry Florentius* case, the District Court of Nevada enforced an arbitration agreement and sent to arbitration a dispute in which the alter ego theory was invoked to extend the agreement to a non-signatory party. All these cases were analyzed under the text of the Convention and, in all of them, the outdated text of article II (2) was not a problem to fulfill the purpose of the Convention: enforce arbitral agreements and awards.

Similarly, in France, we can find decisions that allow the enforcement of arbitral awards with non-signatory parties through the Convention since 1989. Thus, in the case *Société Kis France et al. v. Société Générale et al.*, the Paris Court of Appeals decided to enforce an arbitral award in which the theory of the group of companies was applied.

The examples mentioned above allow us to note that, through a correct interpretation of the Convention, the specific text of Article II (2) thereof should not represent a problem to fulfill its purpose.

III. You shall not enforce, or you may not enforce? The real meaning of article V (1) of the Convention

In this section, we will point out that purpose of the Convention is to promote the enforcement of arbitration awards, so it is consequential to give national courts the discretion to decide whether or not to enforce an award that is subject to one of the provisions of Article V (1) of the Convention.

One of the main concerns of those who propose the amendment of the Convention is the extent of the discretion that Article V (1) confers to national courts. In this sense, one of the main changes proposed by Albert Jan van den Berg's Hypothetical Draft is to modify the its text and replace the "*may*" in Article V (1) with a "*shall*," thus removing the discretion given by that article to the national courts. According to the Draft "*[h]aving both provisions in the Draft Convention, the introductory language of paragraph 3 can be unambiguous by being mandatory.*" We do not share this view.

On the contrary, we consider that the correct interpretation is the one given by Professor Gaillard who states that "*the true purpose of the convention is to promote the circulation of arbitral awards (...) by establishing a "ceiling", or maximum level of control which courts may exert over them.*"

There will be cases in which, to comply with the real purpose of the Convention, national courts must use its discretion and not take into consideration the provisions contained in Article V (1). We can find a clear example of this situation in the *Commisa v. Pemex* case. In this, the Mexican courts annulled an ICC arbitral award favorable to Commisa alleging that the dispute was not arbitrable. The basis for this decision was the retroactive application of a law promulgated while the arbitration of Commisa and Pemex was ongoing.

Despite the annulment of the arbitral award, Commisa sought its enforcement before the US judicial courts, obtaining a favorable ruling in the first instance. Pemex appealed the decision without success. The Second District Court, using the discretion granted by the Panama Convention (identical to the one contained in Article V (1) of the Convention), decided to confirm the annulled ICC arbitral award. In its reasoning, the Second District Court indicated that accepting the annulment of the Mexican courts would "*be repugnant to fundamental notions of what is decent and just in this country.*"

According to the author, the *Commisa v. Pemex* case is another excellent example of how jurisprudence can clarify specific concepts of the Convention, in this case, when it is proper for the judicial courts to exercise the discretion that the Convention has granted to them.

IV. Two sides of the same coin? The meaning of Article V (2) (b) "contrary to the public policy of that country" and its relationship with Article V (2) (a)

In this section, we will develop that jurisprudence is getting closer to a consensus regarding the meaning of "*contrary to the public policy of that country*", which allows differentiating said provision from the one contained in Article V (2) (a).

First, among the primary concerns of the commentators is the inconsistent and confusing interpretation that national courts give to Article V (2) (b).

Although this situation could have occurred until recently, as Gaillard states, in recent years there is a consistent jurisprudential line pointing out that when Article V (2) (b) of the Convention refers to "*public policy*" it should be understood as a reference to the "*international public policy*."

We can find an example of this new more consistent trend in the *Petrotesting Colombia S.A. et al. v. Ross Energy S.A.* case of 2011, in which the Supreme Court of Justice of Colombia determined that the Convention refers to the "*international public policy*" based on a review of foreign jurisprudence. Thus, said court analyzed that "*Common Law states follow the opinion in the United States of America that public policy is divided into 'domestic and international public policy' [Original English]; Thus, unless an award violates international public policy, the courts must enforce and recognize it.*", understanding that *"(...) the US Court of Appeals stated that the notion of 'public policy' in the New York Convention must be understood restrictively and applies only when the recognition and enforcement of the award is at odds with 'fundamental principles of morality and justice'*".

Second, another concern related to this issue is the level of overlapping that Article V (2) (a) and Article V (2) (b) may have. In Albert Jan van den Berg's Hypothetical Draft, Article V (2) (a) has been subsumed in V (2) (b). In our view, this is not correct.

Bearing in mind that Article V (2) (b) refers to the "*international public policy,*" the line between both articles becomes clearer. Although in some cases an assumption of non-arbitrability may end up constituting an issue of "*international public policy*" (for example, issues related to family or criminal law), I have serious doubts about that the non-arbitrability of a dispute that concerns consumer law or bankruptcy law can reach the standard of "*international public policy*".

In this way, this is the third example of an alleged problem that does not need a revision to be solved.

V. Conclusion: "With a little help from my friends" … The 1958 New York Convention Guide

The purpose of this article is to show that there is not a real need to review the Convention. Instead of that, a consistent interpretation of its terms can solve many of the so-called "issues" mentioned above. But, how do we do to get all the States part of the Convention to understand it consistently?

First, we need national courts to understand that the Convention is a multilateral treaty with 159 parties. Thus, to read it and fully understand its terms national courts need to review what is being developed global-wide. A great example of this is *Petrotesting Colombia S.A. et al. v. Ross Energy S.A.* case mentioned above.

Second, we need a trustworthy guide where national courts could resort when seeking to understand a particular provision of the Convention. Here is where the 1958 New York Convention Guide shines. The work of UNCITRAL and Professors Gaillard y Bermann is a milestone in the interpretation of the Convention. It does not only compile and orders the most crucial jurisprudence until date but also makes it available for free in different languages, assuring that national courts all over the world could have access to it.