

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

Introduction

Efforts to facilitate the resolution of disputes through arbitration can be traced back to the Geneva Protocol of 1923 on "Arbitration Clauses" and the Geneva Convention of 1927 on the "Execution of Foreign Arbitral Awards". The New York Convention was born out of the Draft Convention of the International Chamber of Commerce of 1953 (ICC) and the Draft Convention of the United Nations Economic and Social Council of 1955 (ECOSOC). It was drafted to facilitate and determine uniform legislative principles and standards for the recognition of arbitration agreements and court recognition and enforcement of foreign arbitral awards. The main aim of this convention was the establishment of robust trade and commercial interactions in the international sphere and dispute resolution through arbitration.

Beginning with 24 signatories in 1958, the New York convention now boasts of 159 Contracting Parties which have signed, ratified or joined the Convention. It is indubitable that this convention has provided immense guidance to the global trade and commerce market in a way that no international instrument has been able to. On its sixtieth anniversary, the question facing the global commerce, trade and investment market is whether it managed to achieve the purpose it was drafted for.

However, it must be noted that the global market is constantly evolving and so are national laws. In this time and age, does the convention really uphold the purpose it was drafted for after the Geneva treaties. To this end, seasoned practitioners and renowned scholars have published a plethora of material. A Draft Convention on the International

Enforcement of Arbitration Agreements and Awards: "the Miami Draft" also known as the hypothetical convention has been drafted which carefully examines every provision of the New York convention and proposes to fix the gaps found in the modern-day arbitration practice.

This paper discusses the debated provisions of the convention whilst examining their impact on the functioning of the convention and is concluded with suggestions to solve the situation at hand.

I. New York Convention: Cornerstone of the International Arbitration System

The words of Renaud Sorieul, Secretary of UNCITRAL in 2013 hold true that the New York Convention is one of the most important and successful United Nations treaties in the area of international trade law, and the cornerstone of the international arbitration system. The success of the New York convention since its adoption is renowned worldwide. However, there are issues faced by different actors in an arbitration proceeding despite of the convention being in place. The gravest problem which is faced by the parties is the losing state's abusive resistance to enforcement of an arbitral award. This issue rises from the state's ability to invoke its immunity from execution to resist enforcement and cannot be directly held to be a deficiency in the convention.

It seems rather idealistic that 159 contracting parties would be genuinely and readily willing to adopt another convention for better facilitation enforcement of foreign arbitral awards and a greater degree of liberalism will be attained. The most beneficial outcome to address the issue of revising the convention would be for all contracting parties to make their

national laws compatible with the convention, avoiding differences in interpretation, recognition and enforcement arising in the current practice.

II. New York Convention: An Outdated Instrument in times of Globalization and Privatization

In spite of the heights of success the New York convention has achieved and the ease of enforcement it has provided to the world, we must not ignore the imperfections being debated time and again for the need of a reform. It is prima facie evident that the convention has certain loopholes and hasn't been able to accommodate the evolution and developments in the legal needs specifically with respect to enforcement of foreign arbitral awards.

The following are some of the deficiencies which make it pertinent for this instrument to be reformed:

1. The New York Convention does not contain a definition as to which arbitration agreements fall under the referral provisions of its article II (3).
2. Unnecessarily wide discretion to national courts: Even though it's true that international arbitration, specifically in investor state disputes curtails the administrative sovereignty of a state, it must be understood that it is only after a state signs and ratifies a convention that it applies on them. Hence, it would be unfair to not revise the convention and achieve its purpose only to provide contracting parties wide discretionary powers.
3. Ambiguity in the text of various provisions like-

a. Article V(1) : This ambiguity in the text of the article gives national courts reason to national courts concerned to interpret the word “may” in accord with their desires and preferences. Accordingly, the problem changes to determining the conditions in which the discretionary power to refuse or enforce should be exercised. Thus, the enforcing court need not refuse enforcement if it is convinced or has found that enforcement would be proper even if the award has been set aside at the place where it was made. But if enforcement is refused in one jurisdiction, the winning party need not give up and can seek the enforcement in another jurisdiction, because denial of enforcement in one country does not deprive the award of its legal effect in another jurisdiction. This ambiguity, in addition to the absence of any annulment grounds, has led among academics to different views or interpretations of the enforcing of annulled foreign arbitral awards.

The landmark *Chromalloy* and *Baker Marine* in the U.S courts, and *Hilmarton* cases demonstrate how differently national enforcement courts deal with foreign arbitral awards annulled in their country of origin.

b. the expression “duly authenticated original award” in article IV(1)(a): In practice, most parties submit either the original award or a certified copy of the award, it is wasteful usage of the words “duly authenticated” and may lead to confusion at some stage of the arbitral proceeding.

c. the notion of a “suspended” award in article V(1)(e);

d. reference to “any interested party” in article VII(1)) has not been specified to mean only the parties to the dispute or a third party having significant interests on it’s economic interests.

A conflict lies between Articles V (1), III and VII (1). Article V (1), by using the word “may”, grants the courts the discretion to enforce or refuse enforcement of an award which is rendered in the country of origin if the refusal ground (1) (e) is found. However, Articles III and VII (1), by using the word “shall”, oblige the courts where enforcement is sought to recognize and enforce the arbitral awards. It should not be ignored that although the provisions of Articles III and VII (1) of the Convention expressly compel the recognition and enforcement of arbitral awards, the enforcement courts certainly “have the last word” in determining whether to enforce the awards or not, relying on their discretionary power, particularly if one of the refusal grounds is found.

e. “The manifest disregard of the law” ground puts no end to judicial review and thus affects the stability and finality of the arbitration awards.

In *First Options of Chicago v. Kaplan*, The U.S. court held that it is clear that manifest disregard means more than error or misunderstanding with respect to the law”. By such a statement, it is clear again that the “manifest disregard” of the law is not legally defined and thus taken into consideration by all courts.

4. The ‘public policy’ ground for refusal under article V (2) must be aligned with the existing judicial interpretation of it to give it a more universal applicability instead of being used as a loophole by national courts for resisting enforcement. For instance, the proceedings in the courts of France, Switzerland and the United Kingdom in the well-known *Hilmarton* case highlighted the problem that can result from the enforcement of an arbitral award that has been set aside in its country of origin, as well as the lack of consistency in interpreting and applying the same language (“public policy”) of the New York Convention. Paulsson and

other commentators say that “not all countries are safe havens for international arbitration. Some cling to wide powers of judicial review. Others have unclear legislation. Yet others have apparently adequate legislation but their courts seem to misapply the law - for example by adopting an over-elastic interpretation of ‘violation of public policy’ as grounds for setting aside awards”

5. It must be mentioned clearly in the convention that the party against whom the award is invoked cannot rely on refusal grounds 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.

The above shortcomings in the New York Convention cannot be remedied by the UNCITRAL Model Law on International Commercial Arbitration of 1985 (the “UNCITRAL Model Law”), as revised in 2006. The reason is that the provisions relating to enforcement of an arbitral award as set forth in the UNCITRAL Model Law are almost the same as those contained in articles III and VI of the New York Convention (article 35), because of the policy decision taken in 1985 to follow as closely as possible the New York Convention.

III. The Way Forward: Harmonization of National laws with the purpose of the New York Convention

Will it ever be possible to draft a provision prohibiting the inherent bias state courts have for state owned enterprises? No, because state sovereignty is a major barrier to the

development of any universal rule of law. There is, however, a possibility of a harmonious construction of national laws with respect to the New York Convention to get rid of the discretionary interpretations by different courts. Harmonization of the application and interpretation of the Convention can also be furthered by the publication of court decisions on the Convention. As the Convention became more widely adhered to and court decisions started to appear, it became apparent that a compilation of national court decisions on the Convention would be useful. Such a publication would reveal different interpretations and, by making them public, might lead to harmonization.

Even though the solution to harmonize might put rest to the urgency in need for revising the convention for now, some suggestions are being put forth through this paper to introduce reform in due course of time.

The internationally mandated written form of arbitration agreements could be done away with whilst requiring the applicable law for question concerning the validity of the arbitration agreement.

In order to cater to the time lapse issue between the law at the time of making of an award and recognition or enforcement of the award, the convention must clearly answer it.

It must also be clearly mentioned that the court must examine the validity of the arbitration agreement on a prima facie basis only in the context of dealing with a request to refer the dispute to arbitration. The reasons for such a limited examination are that the referral should be decided expeditiously by the court, and that that arbitral tribunal is the first instance to conduct a full review of an objection to the validity of the arbitration agreement, subject to

eventual subsequent court control in an action for setting aside or enforcement of the arbitral award.

The public policy is limited to the narrower category of international public policy as developed by courts in many countries in relation to public policy, including arbitrability, under the New York Convention.

The convention must also make it mandatory (“enforcement shall be refused”) instead of leaving a wide discretion to the enforcing courts under article V(1) of the New York Convention.

The suggestion by UNCITRAL in its “Recommendation regarding the interpretation” of 2006 that article VII(1) “should be applied to allow any interested party to avail itself of the 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” must be adopted in the revised convention.

As international business continues to retain its position as a central part of the economy, international commercial arbitration will flourish. It is up to us practitioners to implement changes to propel arbitration as a modern, essential tool to resolve current international commercial differences.