

The pre-New York Convention regime for the resolution of international trade disputes, based almost entirely on international litigation, was deficient and unsatisfactory. Party autonomy was usually absent, and the possibility of enforcement of decisions on the merits was dependent on the private international law rules of different legal systems, which were difficult to interpret and access to foreign commercial users. Indeed, the resolution of international disputes was a daunting process. That situation dramatically changed in 1958 with the adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards which has been considered as the cornerstone of the law of international arbitration. The New York Convention offered a simple, comprehensive and effective way of resolving international disputes by arbitration. Yet, 60 years after its adoption, some proposals of reform or adaptation to current approaches and modern developments are already on the table.

In order to conclude about the convenience of a reform, this essay proposes in section 1, to identify the advantages and unique features of the New York Convention. Section 2 examines the disadvantages and omissions of the aforementioned legal instrument. Section 3 balances the benefits and disadvantages in order to analyse the appropriateness and convenience of a reform. Finally, section 4 concludes.

1. Benefits of the New York Convention

The 1958 New York Convention is, undoubtedly, the most successful instrument in the realm of international trade law. That success can be illustrated not only with the number

of parties which have adopted it —to date, 159 independent States— but also with the exponential increase of world trade after its adoption. In its simplest terms, the Convention incorporated two radical principles which, at that time, revolutionised the resolution of disputes with international elements, namely, enforcement of arbitration agreements and enforcement of foreign arbitral awards. These principles, encapsulated respectively in articles II and V, are the main contributions of the Convention to the resolution of transnational disputes. Whilst the former provision upholds the principle of party autonomy by requiring national courts to refer the parties to arbitration, the latter incorporates a system of recognition of foreign arbitral awards in States bound by the Convention subject to limited exceptions.

Furthermore, the Convention establishes a minimum legal framework, but it permits national courts to enforce arbitral awards under higher standards than those included in its provisions. In fact, article VII offers flexibility to States which want to go further without compromising the minimum arbitration framework set forth in the Convention. This article has permitted jurisdictions such as France to innovate and adopt arbitration-friendly answers and developments to current challenges. Accordingly, as it has been demonstrated, the New York Convention provides important advantages which are now essential in the adjudication and enforcement of transnational disputes, so unless the Convention presents unsurmountable problems or important disadvantages, one might ask: is there really a need to revise the New York Convention?

2. Disadvantages and omissions of the New York Convention

The New York Convention is universally regarded as one of the most successful treaties, however, it would be unwise to negate that some aspects could be subject to improvement. In this context, a group of scholars led by Van den Berg, have claimed that the said instrument is too short, incomplete or uncertain for modern arbitration and, consequently, it is important to address its reform.

To begin with, the first argument can be easily rejected since more articles or extensive length do not necessarily ensure a better legal instrument; quite the contrary, short and clear texts are usually preferred in international practice over long instruments since they are more accessible to practitioners and users of different legal systems and traditions. Undoubtedly, the Convention is a short instrument composed of only sixteen articles. Nevertheless, claims that it should be amended based on the number of provisions or words are simplistic and illogical; therefore, these proposals should be rejected.

Secondly, it is sometimes argued that the Convention is incomplete. For instance, in article II, when establishing the formal requirements of an arbitration agreement, the Convention does not set out what the words “in writing” mean. In these cases, the reform commentators suggest, first, to revisit existing articles and second, to create new provisions in order to obtain a comprehensive and complete Convention which would give answers to most of the current challenges. However, a reform of an international instrument binding on 159 States cannot be based on potential *lacunae* if that instrument has overall achieved its purpose. The eagerness of covering every aspect requiring legal

interpretation could paradoxically lead to a long and rigid instrument which will raise problems of applicability. In fact, rather than embarking upon a reform, these minor difficulties can be overcome with appropriate and reasonable legal interpretation.

Thirdly, the pro-reform commentators argue that the Convention is uncertain since some concepts such as the public policy ground to resist enforcement of arbitral awards, can be used by national courts as a way of circumventing the framework and objectives of the Convention. In this context, the *raison d' être* of a reform of public policy is to provide legal certainty to parties seeking to enforce a foreign award. It is unclear, however, how a new convention would solve the public policy issue or, in general, the misapplications or current problems. In fact, national courts of some States will be ready to use pretexts other than the public policy exception in order to undermine the Convention. On the face of it, a reform would not achieve the aim of preventing courts to protect their own nationals and local interests in an unlawful way. Moreover, another aspect in which uncertainty can be present is in the excessive delays in the process of enforcement of awards since, sometimes, States aggressively resist enforcement using the principle of state immunity. Nevertheless, as Gaillard have argued, these circumstances are out of the scope of the Convention; hence, this issue cannot be improved through a reform.

Lastly, it is also claimed that the international arbitration framework requires a uniform interpretation and application of the Convention. The pro-reform scholars would claim, for example, that the concept of public policy needs uniform interpretation.

Unfortunately, public policy cannot be turned into a worldwide principle binding all current Parties to the New York Convention for two reasons. First, the concept and interpretation of public policy vary from country to country, even if indirectly, arbitration-friendly jurisdictions are interpreting it in a similar way. Secondly, States need to enforce constitutional rights and higher law constrains according to their local laws. Certainly, public policy will always be present as an exception to recognition and enforcement of foreign arbitral awards.

The amendment of the public policy exception is not the only example in which reforms have been proposed with the final aim of adopting uniform approaches on principles which are currently subject to different interpretations. For instance, it has been proposed that the review of national courts on whether an arbitration agreement is “null and void, inoperative or incapable of being performed” should be limited to a *prima facie* examination. It is, however, well settled under English law, that the tribunal does not have exclusive powers to determine its jurisdiction, nor does it follow that the courts of the seat do not have the power to rule on it before the arbitral tribunal. Indeed, the principle of competence-competence shall be recognised in every jurisdiction bound by the Convention, but each legal system is free to adopt the positive or negative effects of the aforementioned doctrine. At first sight, uniformity seems a crucial and desirable goal. Yet, measures aiming a uniform interpretation or application of the international arbitration framework will strongly impact on the flexibility of the current Convention which has been one of its greatest successes. In fact, that flexibility has been able to attract legal systems which have traditionally seen some arbitration issues with opposing perspectives.

3. Balancing advantages and disadvantages: is there a need to revise the New York Convention?

The proposals of revision of the New York Convention would be acceptable only if, first, its current state makes appropriate to embark upon a reform. In that case, the failure in achieving its main purpose or the presence of major disadvantages or problems would make necessary a revision. Secondly, even if the Convention has been a successful instrument, it is still possible to accept a reform if a new instrument improves the international arbitration regime by providing solutions to current challenges.

This essay proposes then, to divide the question of the appropriateness and convenience of a reform in two elements or sub-questions. To begin with, if the Convention has not achieved its purpose, it is reasonable to propose its amendment. Similarly, if the Convention presents major problems and disadvantages which are insurmountable, a reform should be addressed without delay. Yet, as it has been previously anticipated, none of these situations can be applied to the New York Convention. First, as set out in its introductory part, the Convention sought to ensure that arbitration agreements and awards would be enforced according to common legislative standards. In this context, it is impossible to negate that the Convention has achieved its key objective. Secondly, regarding the existence of major disadvantages, a balance of the two previous subsections demonstrates that there are not insurmountable problems which need to be readily addressed. In any case, the minor disadvantages or omissions can be overcome with the exercise of party autonomy and appropriate legal interpretation. As a result of this preliminary assessment, it is possible to conclude that revising the Convention is not

currently necessary. Nonetheless, the analysis of the convenience of a reform should not finish here.

Even though the New York Convention does not present major disadvantages and its purposed has been achieved, it is still possible to accept the convenience of a reform if the amendment process provides a superior and better international instrument than the current one. In this case, the rationale behind the reform resides in the sense of improvement of the international arbitration regime rather than in the problems or difficulties of the current Convention. Nevertheless, it is highly unlikely that a new convention would be a better instrument due to several reasons. First, as it has been previously anticipated, a redraft will not solve the problems of the current system such as the public policy exception, because the majority of disadvantages are out of the substantive scope of the Convention. Secondly, a reform would be a source of legal uncertainty which may impact on the uniformity of the New York Convention by severing the current international framework. From a doctrinal point of view, the new proposals such as the Hypothetical Draft Convention might be of high intellectual quality, but it is uncertain how national courts, commercial users and legal systems would react to these reforms. Indeed, it is a venture into uncertainty which may divide States according to a two-tier Convention system. Unquestionably, that result would make the resolution of international trade disputes more complex and uncertain. Thirdly, it is important to stress that currently, there is a strong opposition of scholars, practitioners and States to such a reform. Thus, a potential new convention would probably not be a better instrument than the 1958 New York Convention.

4. Conclusion

The New York Convention has contributed to the adoption and development of arbitration as a method to settle international trade disputes. Although there are some minor problems or omissions, an appropriate legal interpretation will overcome the disadvantages. It is unquestionable that there are strong reasons to resist potential proposals of reform since revising the Convention could be more harmful than helpful to the practice and theory of international arbitration. In times where uncertainty is embedded in the international legal order, it is important to highlight the attributes, success, flexibility and importance of the New York Convention. To put it simply: if something works, it should not be changed.