The Urgency of Not Revising the New York Convention

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I. INTRODUCTION

As with its fortieth anniversary, the celebration of the fiftieth anniversary of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has justifiably given rise to questions as to the necessity and/or feasibility of the Convention's revision. To date, the majority view has been in favor of not opening such an avenue.[1] Today, however, important scholars have suggested that the Convention has aged in such a way and has given rise to a sufficiently large number of unsatisfactory decisions that the time has come to initiate a revision process.[2] A preliminary draft has been put forward to stimulate reflection on the subject.[3]

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1. See for example G. HERMANN, "The 1958 New York Convention: Its Objectives and Its Future" in *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, ICCA Congress Series no. 9 (1999) (hereinafter *ICCA Congress Series no. 9*) p. 15; A.J. VAN DEN BERG, "The Application of the New York Convention by the Courts" in *ICCA Congress Series no. 9*, p. 34; A.J. VAN DEN BERG, "Striving for Uniform Interpretation" in *Enforcing Arbitration Awards Under the New York Convention: Experience and Prospects* (United Nations Publication 1999) p. 42; W. MELIS, "Considering the Advisability of Preparing an Additional Convention, complementary to the New York Convention" in *ibid.*, p. 44; P. SANDERS, "A Twenty Year's Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards", 13 The International Lawyer (1979) p. 269 et seq.; J. PAULSSON, "*L'exécution des sentences arbitrales dans le monde de demain*", Rev. arb. (1998) pp. 637-652; J. PAULSSON, "Towards Minimum Standards of Enforcement: Feasibility of a Model Law" in *ICCA Congress Series no. 9*, p. 575.
2. See, in particular, A.J. VAN DEN BERG's Explanatory Note, this volume, pp. 649-666. See also *11th IBA International Arbitration Day, The New York Convention: 50 Years*, 1 February 2008 at <www.uncitral.org/pdf/uncitral/NYarbday-programme.pdf> (last accessed 21 August 2008). For a comprehensive review of the case law generated on the basis of the Convention, see E. GAILLARD and D. DI PIETRO, eds., *Enforcement of Arbitration Agreements and International Arbitral Awards* (Cameron May 2008).
3. See the text of the Hypothetical Draft Convention proposed by A.J. VAN DEN BERG, this volume, pp. 667-669.

Although its language is at times dated and certain of its provisions could be modernized,[4] the New York Convention continues, on the whole, to fulfill its purpose in a satisfactory manner and there would be, in my opinion, more to lose than to gain in embarking upon a revision process. Should a revision nevertheless be considered by the States parties to the New York Convention, it could not simply embrace the suggestions found in the Hypothetical Draft prepared for the purposes of this Conference.

II. IS THERE A NEED TO REVISE THE NEW YORK CONVENTION?

The reason why I strongly believe that the New York Convention should be left alone is threefold. It can be summarized by what I call the "three NOs": there is no need, no hope and no danger.

1. There is No Need to Revise the New York Convention

The sole fact that the language of the Convention is at times outdated and that some of its provisions could be fine-tuned does not warrant embarking upon a revision of an instrument binding on 144 States at the time of this writing. Such a massive undertaking would be justified only if one were to identify serious flaws in the enforcement process and ascertain that those flaws can be cured by a mere modification of the language used in the instrument.[5]

Put in perspective, there are only two serious issues regarding the enforcement of awards, none of which can be fixed by a revision. The first difficulty stems from recurring instances of bias in favor of local companies, in particular State-owned companies, by the courts in certain jurisdictions at the place of enforcement. However, what revision would prevent the Russian courts (which have shown little evidence of independence in the recent Yukos or TNK-BP sagas) from refusing to enforce an award affecting the interests of a State-owned company of the Russian State itself on the ground

4. For example, Art. II(3) could be clarified in that courts confronted with a dispute covered by an arbitration agreement should limit their determination of whether the arbitration agreement is "null and void, inoperative or incapable of being performed" to a prima facie review. Art. V, which sets forth the grounds for refusing recognition or enforcement of an award, is somewhat convoluted. It could be both simplified and modernized in the following manner: first, the reference to the "law of the country where the award was made" with respect to the validity of the arbitration agreement (Art. V(1)(*a*)) or with respect to the composition of the arbitral tribunal (Art. V(1)(*d*)) is outdated; second, Art. V(1)(*e*), which provides that the recognition or enforcement of an award can be refused if "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, [it] was made", should be removed or, at the very minimum, limited in scope. Finally, the issue of arbitrability under Art. II(1) and Art. V(2)(*a*) could also be modernized.

5. The 2008 PricewaterhouseCoopers report on *International Arbitration: Corporate Attitudes and Practices* does not suggest any such difficulties. It reveals, in relation to recognition and enforcement of arbitral awards, that "[t]he majority of [surveyed] corporations that had enforced awards reported that they had not encountered major difficulties in doing so", at <www.pwc.co.uk/pdf/PwC_International_Arbitration_2008.pdf?utr=1> (last accessed 21 August 2008) p. 6.

of an alleged violation of public policy?[6] The public policy exception will always be present and the courts of the place of enforcement will always be in a position to manipulate that ground to refuse enforcement.

The second and very serious problem is that of States that conclude arbitration agreements, lose in the arbitration and never satisfy the award. The *SEEE v. Yugoslavia* award, for example, took twenty-eight years to be enforced.[7] The *Noga* case provides another striking example of the losing State's abusive resistance to enforcement.[8] These difficulties have no relation whatsoever with the New York Convention but result solely from the State's ability to invoke its immunity from execution to resist enforcement. They could effectively be resolved through an international instrument. Yet, no significant progress was made in this respect in the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property.[9]

6. See the Report of the Committee on Legal Affairs and Human Rights, "The Circumstances surrounding the Arrest and Prosecution of Leading Yukos Executives", S. LEUTHEUSSER-SCHNARRENBERGER, Parliamentary Assembly, Council of Europe (November 2004, doc. 10368); Report on Economic Affairs and Development, "Europe's Interest in the Continued Economic Development of Russia", K. SASI, Parliamentary Assembly, Council of Europe (September 2006, doc. 11026) para. 57; E. S. BERGER, "Corruption in Russia's *Arbitrazh* Courts", 14 BNA'S Eastern Europe Reporter (2004, no. 12); E. S. BERGER, "Corruption in the Russian *Arbitrazh* Courts: Will there be Significant Progress in the Near Term?", 38 The International Lawyer (2004, no. 1); "The Judicial System of the Russian Federation: a System-Crisis of Independence", Report of the NGO RUSSIAN AXIS (2004).
7. Award of 2 July 1956, 25 Int'l L. Rep. (1957) p. 761. For a Swiss decision, see Trib. Vaud, 12 February 1957 (*Société Européenne d'Etudes et d'Enterprises v. République Fédérative de Yougoslavie*), Rev. Crit. Dr. Int. Pr. (1958) p. 359; for a Dutch decision, see *Hoge Raad*, 26 October 1973, as translated by G. GAJA, 5 International Commercial Arbitration (1978) p. 18; for a French decision, see *Cour de cassation*, 1st Civil Chamber, 18 November 1986 (*Etat français v. Société européenne d'études et d'entreprises (S.E.E.E.) et autres*), 26 International Legal Materials (1987) p. 373. See also, G. R. DELAUME, "*SEEE v. Yugoslavia*: Epitaph or Interlude?", 4 Journal of International Arbitration (1987, no. 3) p. 25.
8. *Ambassade de la Fédération de Russie en France et al. v. Compagnie Noga d'Importation et d'Exportation*, Rev. arb. (2001) p. 116; Court of Appeal, Paris 1st Civil Chamber, 22 March 2001, Rev. arb. (2001) p. 607; United States Court of Appeals, Second Circuit, 16 March 2004 (*Compagnie Noga d'Importation et d'Exportation S.A. v. The Russian Federation*) ICCA *Yearbook Commercial Arbitration* XXIX (2004) pp. 1227-1250. For an overview of the *Noga* arbitration and litigation in French and American courts, see N.B. TURCK, "French and US Courts Define Limits of Sovereign Immunity in Execution and Enforcement of Arbitral Awards", 17 Arbitration International (2001, no. 3) p. 327 et seq.
9. See General Assembly Resolution 59/38, annex, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49* (A/59/49), 2004. See also H. FOX, "State Immunity and the New York Convention" in E. GAILLARD and D. DI PIETRO, eds., *op. cit.*, fn. 2, p. 829; E. GAILLARD, "Effectiveness of Arbitral Awards, State Immunity from Execution and Autonomy of State Entities, Three Incompatible Principles" in E. GAILLARD and J. YOUNAN, eds., *State Entities In International Arbitration, IAI Series on International Arbitration No. 4* (Juris Publishing 2008) p. 179.

2. *There is No Hope to Achieve a Better Instrument Than the Existing Convention*

There is no hope, in the current environment, that a significant number of the 144 States parties to the Convention (at the time of this writing) would agree to make the enforcement process more efficient.

The pro-arbitration bias which has been the prevailing state of mind in a number of States in the past decades has been somewhat undermined by the dramatic development of arbitrations based on investment protection treaties. States being, by definition, in the position of a defendant in such arbitrations, they have tended to develop a defendant mindset.[10] In this context, it is doubtful whether a large number of States, which are increasingly in a position to resist enforcement of awards, would be genuinely willing to enhance the effectiveness of the enforcement process. Against that background, it is not even certain that the degree of liberalism achieved in 1958 could be attained today.

3. *There is No Danger in Leaving the Current Instrument Untouched*

On the other hand, there is no danger in leaving the New York Convention in its current state. The genius of the Convention is to have foreseen the evolution of arbitration law. As per its Art. VII, the Convention sets only a minimum standard. States can always be more liberal. By definition, the Convention cannot freeze the development of arbitration law. Thus, there is no danger in leaving it untouched.

The assessment of the efficiency of the enforcement of awards in today's world cannot be made by considering solely the New York Convention case law. In some of the most pro-arbitration jurisdictions such as France, the number of cases referring to the New York Convention is scarce precisely because the ordinary rules governing enforcement of awards in France are more liberal than those of the Convention and are routinely applied without any need to refer to the Convention.[11] The Convention is there as a safeguard. It does not need to be used, but it does no harm.

10. See, for example, S. SCHWEBEL, "The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law" in *Global Reflections on International Law, Commerce and Dispute Resolution* (ICC Publishing 2005) p. 815 et seq. The regression of the pro-arbitration bias in the United States is also evidenced by the legislative progress of the Arbitration Fairness Act of 2007 [A bill to amend chapter 1 of title 9 of United States Code with respect to arbitration], which restricts significantly the arbitrability of a number of matters, including pre-dispute arbitration agreements to arbitrate disputes "arising under any statute intended ... to regulate contracts or transactions between parties of unequal bargaining power", as well as the principle of the autonomy of the arbitration agreement and that of competence-competence. At the time of writing, the Bill had been introduced into the Senate (12 July 2007) and undergone hearings in the Committee on the Judiciary Subcommittee on the Constitution (12 December 2007); see, Sect.4.2, Fairness Arbitration Act of 2007, Library of Congress, at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:s.01782:> (last accessed 21 August 2008).

11. *Cour de cassation*, 1st Civil Chamber, 29 June 2007 (*Société Putrabali Adyarnulia v. Société Rena Holding et Société Mnogutia Est Espices*) Rev. arb. (2007) p. 507; *Cour de cassation*, 1st Civil Chamber, 23 March 1994, Rev. arb. (1994) p. 327, note Ch. JARROSSON, p. 328.

Should one conclude that it would be useful to modernize the grounds for the review of awards by national courts, the first candidate for a revision would be Art. 34 of the UNCITRAL Model Law on International Commercial Arbitration which sets out the grounds for the setting aside of awards. In 1985, the drafters of the Model Law chose not to revisit the annulment grounds in Art. 34 but simply track those found in Art. V of the New York Convention. Presumably, some progress in the drafting of those grounds – which correspond to the grounds to refuse enforcement in the Convention – could be achieved. The modernization of those grounds in Art. 34 would enable States to adopt a new set of standards regarding the setting aside of awards, which could easily be transposed for the purposes of the recognition and enforcement of awards pursuant to each jurisdiction's ordinary rules, while keeping the New York Convention as a minimum standard. In so doing, one could achieve modernization of the grounds for the review of awards without jeopardizing the delicate balance struck in the New York Convention.

III. SHOULD A REVISION BE NEVERTHELESS CONTEMPLATED, IT SHOULD STRIKE A DIFFERENT BALANCE

The Hypothetical Draft Convention proposed for the purposes of discussion in this Conference is clearly thoughtful and internally consistent. In my opinion, however, it does not achieve the desired balance.

The title itself is telling: it is a proposed convention on the "international enforcement of arbitral awards", whereas it should be a convention on the "enforcement of international arbitral awards". What is "international" is the award, not the enforcement.

More fundamentally, the gist of the Hypothetical Draft Convention is to adopt a purely traditional choice of law approach, which consists in allocating the issues which may arise in the context of the enforcement of an arbitration agreement or an arbitral award essentially between the law of the seat and the law of the place of enforcement. The law of the seat is mentioned seven times in the Hypothetical Draft Convention. It would essentially govern the arbitration agreement and, on a subsidiary basis, the composition of the arbitral tribunal and the arbitral procedure. The law of the place of enforcement is mentioned three times and, understandably, would govern international public policy, including arbitrability.

This systematic use of a choice of law approach is highly problematic. The least one would expect from a convention elaborated at the beginning of the twenty-first century – whose purpose is to facilitate the enforcement of arbitration agreements and arbitral awards – is to develop internationally acceptable standards and not merely distribute matters between the law of the seat and that of the place of enforcement, irrespective of their content, degree of liberalism or sophistication.

Such a criticism equally applies to the proposed rules regarding the arbitration agreement and those regarding the recognition of the award.

1. The Arbitration Agreement

According to the Hypothetical Draft Convention, the courts seized of a dispute should refer such dispute to arbitration if "there is *prima facie* no valid arbitration agreement under the law of the country where the award will be made".[12] I concur whole-heartedly with the *prima facie* test, which I have long advocated. That is the whole idea of the negative effect of competence-competence.[13]

However, the reference to the law of the seat as the governing law of the arbitration agreement is misplaced. It is not a good connecting factor for the arbitration agreement. Further, it takes away most of the benefit of the limitation of the assessment of the existence and validity of the arbitration agreement to a *prima facie* test.

One can easily anticipate the difficulties associated with the use of a *prima facie* test in a system based on a choice of law approach. The question arises in situations in which one of the parties engaged in a dispute before a court invokes an arbitration agreement while the other party opposes the reference of the dispute to arbitration. That court must determine *prima facie* if the arbitration agreement is valid and binding on the relevant parties. If, following the proposed Hypothetical Draft Convention, the court has to apply to this issue the law of the seat of the arbitration, it may find itself in an impasse in all cases in which the seat has not been selected at that stage. Presuming the seat has been selected, either in the arbitration agreement or pursuant to the mechanisms contemplated in the relevant arbitration rules, the matter is still significantly complicated by the requirement of resorting to the law of the seat. In many instances, that law will be foreign to the court seized of the matter and may well have to be evidenced by way of expert witnesses. In all likelihood, each party will present experts with diverging views. Lengthy expert testimonies may ensue and it is easy to predict that the simplest arbitration clause will give rise to convoluted discussions based on alleged theories found only in the law of the seat.

In reality, *prima facie* means *prima facie*. The court seized of the matter can assess the arbitration agreement on its face. It can determine if the agreement exists as between the parties and has been entered into in circumstances which are not manifestly aberrational. Nothing further is required and any argument going beyond such a simple assessment on the basis of generally accepted practices should be left to the arbitrators to decide in the first instance. This is why *prima facie* and the requirement of reasoning in choice of law terms are hardly compatible.

2. The Arbitral Award

In 1958, the tension between those who wanted to deal with "international" awards (which calls for a substantive rules methodology) and not with the "foreign" awards

12. Art. II(2)(b) of the Hypothetical Draft convention, this volume, pp. 667-669.

13. See, for example, E. GAILLARD and Y. BANIFATEMI, "Negative Effect of Competence-Competence, The Rule of Priority in Favour of the Arbitrators" in E. GAILLARD and D. DI PIETRO, eds., *op. cit.*, fn. 2, p. 257, and references cited therein.

(which calls for a choice of law approach) resulted in a compromise.[14] This compromise consisted, as far as the validity of the arbitration agreement, the composition of the arbitral tribunal and the arbitral procedure are concerned in the context of the enforcement of the award, in downgrading the law of the seat of the arbitration to a subsidiary position applicable only absent an agreement between the parties. This was a major step as compared to the mandatory application of the law of the seat found in the Geneva Conventions of 1923 and 1927. The Hypothetical Draft Convention does not entail any progress in this respect. The progress would be to remove the reference to the law of the seat. What is at stake are "international" awards, not "Swiss" or "Indian" awards.

As to the difficult issue of the enforcement of an award set aside in the country in which the arbitration took place, the Hypothetical Draft does not achieve any significant progress either. To permit the recognition of awards set aside by the courts of the seat of the arbitration on the basis of grounds other than those which are generally accepted and found in the Convention is not going to solve the problem of awards conveniently set aside for the benefit of the local party, often the State or a State-owned entity (as in *TermoRio* in Colombia or *Bechtel* in Dubai).[15] If the Hypothetical Draft Convention were to be adopted, parties seeking to exploit the fact that the arbitration took place in their own country and to have their courts annul the award with a view to resist enforcement elsewhere would simply have to become a little more savvy. They would have to seek the annulment of the award on the basis of an accepted ground, but since those grounds necessarily include the violation of due process or international public policy, their task would not be too difficult. They would simply have to argue that, in the case at hand, such a violation took place. If successful, for good or bad reasons, the net result of the Hypothetical Draft Convention would be to give an international effect to such decisions even if they are designed to rescue the local party. The impact of parochial decisions would not have been taken care of, quite to the contrary.

One has to recognize that a court wanting to favor the local party can not only use a ground to set aside which is not generally accepted (for instance, in *Chromolloy*, the fact that the award allegedly misapplied administrative law)[16] but also misapply in a much more subtle way grounds which are generally accepted (due process and international public policy being the easiest to manipulate). Why should the court where the money

14. On the negotiating history of the New York Convention, see, e.g., Robert BRINER and Virginia HAMILTON, "The History and General Purpose of the Convention. The Creation of an International Standard to Ensure the Effectiveness of Arbitration Agreements and Foreign Arbitral Awards" in E. GAILLARD and D. DI PIETRO, eds., *op.cit.*, fn. 2, p. 3.

15. *Consejo de Estado de Colombia, Sala de lo Contencioso Administrativo, Sección Tercera*, 1 August 2002 (*Electrificadora del Atlántico S.A. E.S.P. v. Termorío S.A. E.S.P*) expte. 11001-03-25-000-2001-004601 (21041); Dubai Court of Cassation, 15 May 2004 (*Int'l Bechtel Co. Ltd. v. Dep't of Civil Aviation of Gov't of Dubai*) (*Bechtel*). For decisions relating to *Bechtel* in American and French Courts, see, *In re Arbitration Between Intern. Bechtel Co., Ltd. and Department of Civil Aviation of the Government of Dubai*, 360 F.Supp.2d 136 (DDC 2005) and Paris Court of Appeal, 29 September 2005 (*Bechtel*), Rev. arb. (2006) p. 695, note H. MUIR-WATT.

16. Cairo Court of Appeal, 5 December 1995 (*Ministry of Defence v. Chromalloy Aero Services Company*), Rev. arb. (1998) p. 723, note Ph. LEBOULANGER.

is attached defer to the decision of the court in which the arbitration took place, especially when this place is the home country of one of the litigants? The Hypothetical Draft Convention simply fails to address this crucial problem.

In short, the issues raised by a potential revision of the New York Convention are much more intricate and likely to be highly controversial than one would expect at first sight. Against that background, the inescapable conclusion is that it is absolutely urgent to do nothing.