

60 YEARS OF THE NEW YORK CONVENTION: A TRIUMPH OF TRANS-NATIONAL LEGAL CO-OPERATION, OR A PRODUCT OF ITS TIME AND IN NEED OF REVISION?

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The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards – known as the “New York Convention”- has been described as the most important and successful United Nations treaty in the area of international trade law. Renaud Sorieul, the Secretary of UNCITRAL has called it “the cornerstone of the international arbitration system”.

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Despite its significance, the Convention is actually a very unassuming document. It is a mere 5 pages long, made up of 16 Articles, with a surprising directness to the drafting. One questions whether a treaty of this nature would look quite so minimalist if it were to be negotiated today. The global reach of the Convention is impressive. The tally of signatory states now stands at 159 (with Sudan having deposited its instruments of accession on 26th March this year). Herbert Smith Freehills is working with Sierra Leone on its accession, and other states are looking to sign up: the “160th” state is anticipated this year. Out of a total of 195 countries in the world, 80% are contracting states.

On the 60th anniversary of its creation, Paula Hodges QC, Hannah Ambrose and Vanessa Naish consider the impact of the New York Convention contemplating the reasons for its success and the motivation of States in accepting the obligations it imposes: Dr. Jörg Weber of UNCTAD comments on the impact the Convention has on its Contracting States, including on FDI inflows; and Alastair Henderson and Gitta Satryani present the results on a survey on enforcement of arbitral awards in the ASEAN region. We also ask whether the Convention remains fit for purpose in its current form, and, if not, whether revision is a practical possibility.

HOW DID THE NEW YORK CONVENTION COME ABOUT AND WHAT DOES IT DO?

In the 1920s the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 were agreed and entered into by a limited number of states. Both were generally considered inadequate in achieving the enforcement objectives they had been designed for, and an initiative began at the International Chamber of Commerce ("ICC"), to replace them. The ICC issued a draft convention in 1953 and change was pushed forward within the auspices of the United Nations. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted by the UN following a diplomatic conference held in May and June 1958 at the United Nations Headquarters in New York, and entered into force on 7 June 1959.

The Convention's principal aim is that foreign and non-domestic arbitral awards should not be discriminated against by courts asked to enforce them. It obliges Contracting States to ensure such awards are recognised and generally capable of enforcement in their jurisdiction in the same way as domestic awards. A second aim of the Convention is to require courts of Contracting States to uphold valid arbitration agreements and stay court proceedings in respect of matters which the parties have agreed should be resolved by arbitration. In short, by signing up to the Convention, a state agrees that its courts will respect and enforce parties' agreements to arbitrate, and to recognise and enforce any resulting arbitral award in its jurisdiction subject to only very limited grounds for refusal.

Both limbs of the Convention are critical factors in the growth and popularity of arbitration across the world in the last 60 years. Privacy, the ability to choose an arbitral tribunal and neutrality are also considered valuable aspects of the arbitral process. However, the knowledge that the parties' agreement will be upheld and any resulting award will be enforced across 80% of the countries in the world is fundamental. Without these features, it is doubtful whether arbitration would have become the preferred method of cross-border dispute resolution.

The knowledge that an arbitral award can be enforced by the coercive powers of the courts in countries around the world also encourages voluntary compliance. A well-respected academic study found that 9 out of 10 awards are satisfied without the need for enforcement proceedings.¹



"The New York Convention's contribution to the achievement of Sustainable Development Goals: An Interview with Dr. Jörg Weber, Head of Investment Policies Branch, Division on Investment and Enterprise, UNCTAD"

Dr Jörg Webber

The United Nations Conference on Trade and Development ("**UNCTAD**")'s role is to advise countries on developing frameworks to attract more foreign investment, increase the economic benefit derived from that investment, and help them manage any negative impacts of it. UNCTAD has estimated that additional annual funding of US\$ 2.5 trillion is required to achieve the Sustainable Development Goals ("SDGs") in developing countries.

Increasing the participation of the private sector in SDG financing is a crucial task. Membership in the New York Convention can be an important prerequisite in this regard, although such Membership alone will not solve the issue. There are now about 40 states which are not contracting states, and these are mostly least developed countries in Africa and the Pacific region.

The Convention can have an impact on the attractiveness of a country for foreign investment and on its further prosperity and growth. International commercial arbitration provides a way in which international parties can agree to enter into complex and highly valuable contractual arrangements, with the certainty that, in the event of a dispute, there will be a predictable process and an internationally enforceable outcome. And it works. Of the approximately 5000 new arbitration matters being commenced each year, 25% of cases are settled before they get to an award, 49% of the awards are voluntarily complied with, and only 11% of those awards even get to the stage of recognition and enforcement.²

And this is down to the New York Convention.

Without the quasi-global framework that it created, we would not see the uptake of arbitration or compliance with its outcome

UNCTAD recently advised Sudan on its growth and development, recommending accession to the Convention as part of its development strategy.³ Sudan became the 159th signatory state this year. So what is the case for countries to ratify or accede to the Convention?

We firstly look at the contribution that the Convention makes towards the sound legal infrastructure of a country. Ratification of the Convention demonstrates that business can be carried out in that jurisdiction with reduced risk and that there is an ability to recover debts in case things go wrong. This can increase a country's attractiveness for foreign investment and promotes economic growth.

As is the case with other FDI determinants, measuring the Convention's impact on FDI growth is a challenging task, and not without controversy. At the same time, a study by A Myburgh and J Paniagua published in 2016⁴ looked econometrically at the connection between signing the Convention and inward FDI and concluded that the impact was "positive and significant". The study considers UNCTAD data on net FDI inflows for a balanced panel of those countries that joined the NY Convention in the period from 1975 to 2003, the study concluded that FDI is higher in the years after joining the NY Convention. In the four years prior to signing the NY Convention, growth in average FDI inflows is just over 2%. The growth is 10% for the four years after joining the NY Convention and 11 percent for the full eight years after joining the NY Convention.

This accords with an earlier study of Daniel Berkowitz from 2004 which indicated that ratification of the New York Convention leads to increased trade flows.⁵ Acceding to the Convention may also result in reduced interest rates for the signatory state, lightening the pressure on the domestic legal system thanks to the reduced number of complex commercial cases to be litigated in courts, and improvement in the World Bank's Doing Business ranking.

At the same time, it is important to contextualise the findings of econometric studies. Econometric studies can help, but they also have limitations. For example, counterfactuals (ie investments and business relationships that take place without coverage by the New York Convention) suggest that legal instruments' influence on economic matters are limited and that other determinants, in particular the economic ones, are more important.

At the practical level, ratification of the Convention means that investors become less sensitive to weaknesses in a country's domestic institutions once that country has ratified the Convention. Accession to the Convention can also boost local arbitration capacity and often spurs (or is part of) domestic legal reform in the area of arbitration.

Countries considering ratification do raise a number of concerns

There is considerable disquiet around loss of sovereignty - that a country's courts are bound to respond in a particular way to party agreement, even where that agreement results in the resolution of disputes relating to that country's natural resources outside its jurisdiction. There are also financial implications involved, as the costs of international arbitration are typically significantly higher than the costs of litigation in courts. Further, a country considering accession will need to introduce implementing legislation and may need to train its judiciary as well as its legal practitioners.

For some countries, the cost-benefit analysis of this may be challenging, particularly when the economic benefits of ratification do not manifest themselves overnight. In relation to treaty-based investor-state disputes, UNCTAD has concluded that the system of "private" arbitration is not an optimal solution. UNCTAD has therefore been promoting the reform of this system as part of reform of international investment agreements more generally. Although statistically treaty-based disputes account for only an estimated 1-1.5 per cent of all international arbitrations, they have given rise to serious concerns, including due to serious financial implications for States. While discussions on establishing a multilateral investment court are currently under way, they will not affect the Convention's key role in ensuring effectiveness of arbitration between private parties.

Fundamentally, the Convention supports multilateralism and contributes to it by creating a business environment in which people can trust each other. This is not to be assumed in the current global environment when multilateralism is under threat. I see this 60th anniversary as an opportunity to celebrate what has been achieved and focus on the importance of global cooperation. Global trade and investment will be a major factor in the achievement of the UN's Sustainable Development Goals, not least the eradication of extreme poverty by 2030. The Convention's role in that should not be forgotten.

IS THE CONVENTION RIPE FOR REVISION?

The Convention's impact is impressive, as is its current global coverage. The work of UNCTAD aims to achieve global participation. However, whilst the Convention is upheld as the "cornerstone" of arbitration, there have been challenges. Some argue that it should be revised in order to remain relevant and suitable for the years to come.

One such advocate for change is renowned arbitrator, Albert Jan van den Berg. Professor van den Berg raised the prospect of a revision of the Convention in his keynote address at the ICCA Conference in Dublin in 2008 on the Convention's 50th anniversary. He subsequently issued a draft revised text, now widely known as the "Miami Draft" to highlight the purported inadequacies of the existing text and the ways in which it could be improved.

More recently, at an event organised by Herbert Smith Freehills in London to recognise the Convention's 60th Anniversary, Professor van den Berg highlighted growing concerns about the future of the Convention, noting that the rate of successful enforcement is in decline as domestic courts become more sceptical of the work product of arbitrators and, in effect, more anti-arbitration. He also cautioned against the courts' increasingly "liberal" attitudes towards the text, which has resulted on occasion in the interpretation and the application of the text beyond recognition of the text itself.

The Miami Draft proposes fundamental changes to the Convention. For example, Article 1 of the Convention (Field of Application) states that the Convention applies to awards made in the territory of a state other than the state in which enforcement is sought. The test is purely territorial, and, according to Professor van den Berg, is incomplete because the Convention does not apply in the territory of state where award is made. The interpretation by domestic courts of the grounds for refusing enforcement can also be criticised, including with regard to the scope of interpretation of Article V(2)(b) (the "public policy exception"). Further, concern has been expressed (by Professor van den Berg and many others) regarding the permissive interpretation which has been placed by some domestic courts on the word "may" in Article V(1). Such an interpretation introduces a discretion on the enforcing court as to whether to refuse recognition and enforcement on the grounds listed in Article V. A further example of judicial analysis said to justify amendments to the Convention concerns interpretation of Article V(1)(e), most recently by the US and Dutch courts.

Against the plain meaning of the text, Article V(1)(e) (which concerns an award which has not yet become binding on the parties, or has been set aside or suspended by the courts of the seat), has been interpreted to mean that a judgment setting aside an award must be capable of being recognised in the courts of the country where enforcement is sought before the set aside will be considered valid. In so doing, these courts have relied on their own domestic approach to enforcement. The divergent approaches to the recognition and enforcement of awards which have been set aside (well known examples include the *Dallah* and *Hilmarton* cases), undermine arbitration's promise of finality and predictability. Other questions arise around the lack of consistency on the process for enforcement globally.

HERBERT SMITH FREEHILLS IS PROUD TO HAVE BEEN SUPPORTING SIERRA LEONE ON A PRO BONO BASIS IN ITS POSSIBLE ACCESSION TO THE NEW YORK CONVENTION.

WHAT NEXT FOR THE CONVENTION?

Whatever weight one assigns to the criticisms that can be made of the Convention, they do not appear likely to bring about change. Even minor clarificatory revision to the Convention text is highly unlikely as it would require the unanimous agreement of all parties to the Convention. Generating the political will across 159 states to support such change may pose an insurmountable hurdle. Comparisons can be drawn with the ICSID Convention where current efforts to refresh the ICSID process look set to occur through revisions of the ICSID Rules (requiring a still difficult 2/3rd majority) rather than through amending the ICSID Convention itself, which would require unanimity.

Suggestions have also been made that any revisions could be brought about by the addition of an "annex" which can be adopted by signatory states. Yet this raises the spectre of a "two tier" Convention with different states applying different rules and interpretations, with two different sets of jurisprudence running in parallel. By maintaining a single text, jurisprudence remains relevant to all contracting states and is likely to have persuasive value to all, bringing about greater alignment than in a two tier system.

While the Convention might benefit from a refresh to reflect global arbitration practice, clarify uncertainties and to bring about greater consistency in interpretation, few States will, at present, be willing to expend political capital, time and resource on the revision of a treaty which has been shown to be extraordinarily effective. Whilst it is an international law instrument, the Convention becomes operative at national level through the actions of domestic courts. Efforts may therefore be better expended by bodies such as ICCA, UNCITRAL and UNCTAD in focusing on the education and training of state's judiciary and the dissemination of guidance (such as the UNCITRAL Secretariat Guide on the Convention) and interpretive instruments (such as the Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention, adopted by UNCITRAL in 2006). Easy access to jurisprudence through online sources will also remain helpful (such as the Case Law on UNCITRAL Texts ("**CLOUT**") collection, as well as the accumulation of authorities on www.newyorkconvention1958.org).

Whilst the discussion about improving the Convention will continue, the obligations it creates between states undoubtedly establish valuable advantages for private parties on a domestic level. No parallel instrument exists in terms of the global reciprocal enforcement of court judgments – states have been slow to adopt the Hague Convention on Choice of Court Agreements 2005. As a practical matter therefore commercial parties continue to regard the Convention as a key tool in reducing enforcement risk in cross-border transactions.

FOOTNOTES

1. Queen Mary University of London School of International Arbitration and PwC Study International Arbitration: Corporate Attitudes and Practices, 2008, available at:

<http://www.arbitration.qmul.ac.uk/research/2008/index.html>. (the QMUL Study 2008).

2. QMUL Study 2008. Even though the report dates from 2008, subsequent years have not revealed any major changes.
3. See the 2015 Investment Policy Review of the country, at: <https://tinyurl.com/ybuyym5d>
4. "Does International Commercial Arbitration promote Foreign Direct Investment?", A Myburgh and J Paniagua, The Journal of Law and Economics 59(3):597-627 August 2016
5. Daniel Berkowitz, Johannes Moenius & Katharina Pistor, Legal Institutions and International Trade Flows, 26 Mich. J. Int'l L. 163 (2004). <https://tinyurl.com/yb63hyxd>

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