The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards

By Stephanie Cohen

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention" or the "Convention")[1] is a strong incentive to choose arbitration as a means of international dispute resolution. The Convention eliminates some of the uncertainties of transnational business by providing a uniform legal framework for the enforcement and recognition of foreign arbitration agreements and arbitration awards in 142 contracting states, including the United States.[2] By contrast, there is no international regime for the enforcement and recognition of foreign court judgments.[3] It has been said that the Convention, which is celebrating its 50th year, "could lay claim to be the most effective instance of international legislation in the entire history of commercial law."[4] This article provides an overview of the Convention's origin and purpose, in addition to the key substantive provisions of the Convention and its implementing legislation in the United States. The article also summarizes major criticisms of the Convention and suggested improvements.

Origin and Purpose

The New York Convention originates in a report and preliminary draft convention that was presented by the International Chamber of Commerce to the United Nations Economic and Social Council (ECOSOC) in 1953, as a proposed replacement for the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 (the "Geneva Convention").[5] The ECOSOC subsequently presented a revised draft convention to a conference at the United Nations in New York from May 20 to June 10, 1958, which resulted in the adoption of the Convention in its current form.[6]

A major impetus for adopting the New York Convention was the elimination of a cumbersome procedure under the Geneva Convention known as "double exequatur." Because the Geneva Convention required that a party seeking enforcement of an award first prove that the award is "final," many courts interpreted the Geneva Convention to require that a party obtain leave for enforcement in the country of the award's origin before seeking enforcement abroad.[7] The New York Convention sought to streamline enforcement procedures by requiring that an award be "binding" instead of "final," and by shifting the burden of proof to the party against whom enforcement is sought.

Another major impetus for the New York Convention was its limitation of the grounds (set forth below) that could be relied upon by national courts to refuse to enforce an award rendered abroad.

The Convention's Enforcement Regime

Signatories to the New York Convention have two principal obligations.

First, they must recognize "written" arbitration agreements, which are defined in Article II(2) to include "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

Second, they must recognize and enforce foreign arbitral awards as "binding" in accordance with national rules of procedure.[8]

With respect to the second obligation, Article V(1) stipulates that recognition and enforcement of an award "may be refused . . . only if [the party resisting enforcement]" proves: (a) incapacity of a party or that there was an invalid arbitration agreement; (b) a party had improper notice or was unable to present its case; (c) the award exceeded the scope of the submission to arbitration; (d) there were defects in the composition of the tribunal or selection procedure; or (e) the award has not yet become binding on the parties, or has been set aside. In addition to these grounds, under Article V(2), a court may decline to enforce an award on its own initiative if either the subject matter is not capable of settlement by arbitration under its laws, or if recognition or enforcement would be contrary to the "public policy of that country."

Notwithstanding the unenforceability of an award under Article V, as discussed below, some national courts have enforced awards by invoking Article VII(1) to apply more favorable national arbitration law.[9] Article VII(1) provides that the Convention's provisions shall not "deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

U.S. Implementation of the Convention

The United States was slow to adopt the New York Convention. It was not until 1970, 12 years after the Convention was signed, that the United States acceded

to it, and that Congress passed Chapter 2 of the Federal Arbitration Act (the "FAA") in order to implement it.[10] Specifically, Section 202 of the FAA applies the New York Convention in the United States to arbitration agreements and awards that relate to "commercial" disputes that are "not considered as domestic."[11]

The two principal obligations of signatories to the New York Convention are tracked in Sections 206 and 207 of the FAA. Section 206 authorizes federal courts to compel arbitration and appoint arbitrators in accordance with an arbitration agreement governed by the Convention, regardless of whether arbitration is to take place in or out of the United States. Section 207 provides that upon the application of a party within three years of an award having been made, a court "shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the . . . Convention."

As a procedural matter, Section 203 confers subject matter jurisdiction over any proceeding falling under the Convention on the federal courts, while Section 204 specifies the district courts with proper venue. Further, if a proceeding governed by the New York Convention is brought in state court, it may be removed to federal court under Section 205.[12] Finally, Section 208 provides that Chapter 1, which governs the enforcement of domestic awards, has residual effect to proceedings under Chapter 2, to the extent that it is "not in conflict" with Chapter 2 or "the Convention as ratified by the United States."[13]

Not a Perfect Document[14]

In the 50 years since the New York Convention was signed, it has proved highly effective in the enforcement of foreign arbitral awards abroad.[15] In the United States, ratification of the Convention also has contributed to a strong federal policy favoring arbitration.[16] Nonetheless, the Convention has been criticized for textual ambiguities that have resulted in disparate judicial treatment of foreign arbitral awards, as well as costly litigation and lengthy delays in enforcement. A few of the more prominent criticisms of the Convention's enforcement regime are as follows:

The Requirement of a "Written" Arbitration Agreement Is Too Strict and Outdated

Commentators have long lamented that the requirement that an arbitration agreement be in "writing," as defined in Article II(2), is out of step with commercial practice, including e-commerce, and that it is unnecessarily stricter than most national laws.[17] While some national courts have "corrected" this problem by interpreting Article II(2) expansively or relying on national law for determining compliance with the writing requirement,[18] the degree to which strict adherence to Article II(2) is required by national courts has resulted in inconsistent application of the Convention.[19]

To address this disparity, UNCITRAL adopted a recommendation in July 2006 that Article II(2) be applied "recognizing that the circumstances described therein are not exhaustive."[20] It further recommended that the "more favorable rights" provision of Article VII(1) be interpreted to allow "any interested party to avail itself of 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."[21] In doing so, UNCITRAL acknowledged both the "wide use of electronic commerce" and that domestic legislation and case law may be more favorable than the Convention in respect of the form requirement for a valid arbitration agreement.[22] Whether the UNCITRAL recommendation will be effective in harmonizing application of Article II(2) remains to be seen.

The Application of National Procedural Rules to Enforcement Proceedings Creates Invisible Barriers to Global Enforcement

By specifying in Article III that the signatories to the Convention enforce arbitral awards "in accordance with the rules of procedure of the territory where the award is relied upon," the application of national rules of procedure may result in unforeseen barriers to the enforcement of arbitral awards.[23] In the United States, for example, enforcement proceedings have failed based on jurisdictional requirements of federal civil procedure even though awards otherwise were enforceable under Article V of the Convention.[24]

Article V(1)(e) of the Convention Fails to Define the Term "Binding"

Article V(1)(e) provides that enforcement may be refused if the award has not yet become "binding" on the parties, but leaves that term undefined. Although there appears to be a consensus that "binding" does not require a party to obtain leave for enforcement in the country of the award's origin (as many courts interpreted the Geneva Convention to require), there are divergent interpretations in national courts regarding what law should be applied to the question of whether an award is considered binding.[25] One approach, for example, is to consider an award binding if it is no longer subject to appeal on the merits, while another approach is to consider an award binding unless it has been set aside or suspended.[26]

Article V(2)(b) Fails to Establish a Common International Standard of Public Policy

Article V(2)(b) permits a country in which recognition or enforcement is sought to refuse to do so if it would be "contrary to the public policy of that country," but does not draw any distinction between public policy for domestic relations and public policy for international relations.[27] Even though numerous national courts, including federal courts in the United States,[28] have applied a restrictive concept of international public policy to enforcement under the Convention, losing parties may be

encouraged by this ambiguity in the Convention to resist enforcement of arbitral awards on the basis of domestic public policy.[29]

Tension Between Article V(1)(e) and Article VII(1) Creates the Potential for Disparate National Rules of Enforcement and Conflicting Judgments in the Same Dispute

Some have reasoned that by using the word "may" in Article V(1)(e), the Convention grants courts discretion to enforce awards that have been set aside in the country of origin.[30] Others argue the use of the word "shall" in Article VII(1) compels enforcement of an otherwise unenforceable award if domestic law provides more favorable rights.[31] Because the Convention is silent regarding the standards for annulling an arbitration award, or when annulments should have extraterritorial effect, the interplay between these two provisions creates both the possibility of (i) disparate national rules of enforcement, and (ii) conflicting decisions in the same dispute resulting from the enforcement of awards that have been set aside in the place of arbitration.[32]

In the United States, these issues first surfaced in the *Chromalloy* case in 1996.[33] In that case, a court in the District Court of Columbia invoked Article VII to enforce an award made in Egypt that had been annulled by an Egyptian court, reasoning that the award would not have been annulled under U.S. domestic arbitration law. Subsequently, U.S. courts have largely distinguished *Chromalloy* and granted comity to foreign judgments annulling awards.[34] In addition, the D.C. Court of Appeals recently held that a foreign court judgment annulling an award should be respected, absent evidence that the foreign court proceedings were "fatally flawed" procedurally or that the judgment was inauthentic.[35]

The Convention Is Silent on Judicial Authority to Grant Pre-Award Attachments and Other Interim Measures

Because there are no express provisions in the Convention regarding the competence of courts to grant interim measures in aid of foreign arbitration, it is an open question whether national courts are competent to grant pre-award attachment in aid of foreign arbitrations.[36] According to one commentator, "by spinning a web of conflicting precedent and inexplicable exceptions" on this issue, "U.S. courts have increased the cost of private dispute resolution in international transactions."[37]

The Future of the Convention

Such criticisms of the Convention have led to radical proposals for improvement of the international enforcement regime for arbitration agreements and awards. Most notably, in 1993, Judges Howard M. Holtzmann and Stephen M. Schwebel advocated the creation of an International Court of Arbitral Awards with exclusive jurisdiction to determine whether recognition and enforcement of an international award could be refused under the New York Convention,[38] while in June 2008, the foremost authority on the Convention, Professor Albert Jan van den Berg, proposed a "modernization" of the Convention.[39] Others have vigorously opposed tinkering with this highly successful Convention that binds 142 states, for fear that efforts to amend it could lead to its demise. While the adoption of such drastic proposals does seem unlikely given the number and diversity of countries that are parties to the Convention,[40] other commentators have noted that harmonization in the global enforcement regime could be achieved through changes to national arbitration laws and recommendations regarding uniform interpretation by international bodies such as UNCITRAL.[41] However, practitioners can also take control of avoiding roadblocks to enforcement of international arbitration agreements and awards by drafting better arbitration clauses and undertaking due diligence regarding the arbitration laws of countries where international arbitrations will take place and where awards are likely to be enforced.[42]

Endnotes

1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 38, implemented by Chapter 2 of the Federal Arbitration Act, 9 U.S.C. § 201.
2. *See* United Nations Commission on International Trade Law ("UNCITRAL"), Status Table for the Convention, http://www.uncitral.org/uncitral /en/uncitral_texts/arbitration/NYConvention_status.html (last visited July 22, 2008).
3. On June 30, 2005, the Convention on Choice of Court Agreements, governing the recognition and enforcement of certain foreign court judgments, was included in the Final Act of the Twentieth Session of the Hague Conference on Private International Law. Of the Hague Conference's 69 Member States, only Mexico has ratified that convention to date. *See* http://www.hcch.net/index_en.php?act=conventions. text&cid=98 (last visited July 22, 2008).
4. Alan Redfern, *Having Confidence in International Arbitration*, 57 Disp. Resol. J. 60, 61 (2003) (internal quotation omitted). *See also* Gary Born, *International Commercial Arbitration in the United States: Commentary and Materials* 18 (1994).
5. ICC, *Enforcement of International Arbitral Awards: Report and Preliminary Draft Convention*, reprint of ICC Publication No. 174, *in* 9 ICC Bulletin 32 (1998); Geneva Convention, Sept. 26, 1927, 92 L.N.T.S. 302. *See also* Charles H. Brower II, *What I Tell You Three Times Is True: U.S. Courts and Pre-Award Interim Measures Under the New York Convention*, 35 Va. J. Int'l L. 971, 1012 (1994-1995).
6. *Id.* at 1012–14.
7. Albert Jan van den Berg, *The New York Convention of 1958: An Overview* 1, 17 (June 6, 2008), http://www.arbitration-icca.org/articles.html (last visited July 23, 2008).
8. *See* New York Convention, *supra* note 1, Article III.
9. *See* van den Berg, *supra* note 7 at 21.
10. *See supra* note 2.
11. 9 U.S.C. § 202 (applying the New York Convention to commercial legal relationships to which either a non-citizen is a party or there is a reasonable relation with one or more foreign states). *See also Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 19 (2d Cir. 1997).

12. There are significant procedural differences between the enforcement regimes for domestic and international awards under the FAA. In particular, under Chapter 2, there is a longer statute of limitations period for confirming a Convention award, and, unlike Chapter 1, Chapter 2 provides for federal subject-matter jurisdiction. *See* 9 U.S.C. §§ 9, 207.

13. In light of this provision, some U.S. courts have held that a party seeking to vacate an award covered by the Convention but *made in the United States* may invoke both the grounds for refusing to enforce an award which are set forth in Article V of the Convention and the "full panoply of express and implied grounds for relief" contained in § 10 of the FAA. *See Toys "R" Us*, 126 F.3d at 23, *supra* note 11. Practically speaking, however, since the U.S. Supreme Court's recent ruling in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, No. 06-989, 2008 WL 762537 (Mar. 25, 2008) has called into question the availability of any implied grounds for relief under § 10 of the FAA, there is substantial overlap between the grounds for vacating an award under Chapters 1 and 2 of the FAA. *See, e.g., Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier*, 508 F.2d 969, 976 (2d Cir. 1974) (observing that Article V(1)(c) of the New York Convention merely "tracks in more detailed form 10(d) of the Federal Arbitration Act").

14. A comment made in Dana Freyer and Hamid Gharavi, *Finality and Enforceability of Foreign Arbitral Awards: From "Double Exequatur" to the Enforcement of Annulled Awards: A Suggested Path to Uniformity Amidst Diversity*, 13(1) ICSID Rev. 101, 102 (1998).

15. *See* Albert Jan van den Berg, *New York Convention of 1958: Refusals of Enforcement*, 18 ICC Bulletin 1, 34-35 (2007) (noting that out of some 1,400 court decisions on the interpretation and application of the New York Convention, there were refusals in roughly 10% of the cases, and that a "fair number of the decisions resulted from a mistake of one kind or another," such as parties drafting inadequate arbitration clauses). *See also* Freyer and Gharavi, *supra* note 14 at 102; Robert Briner, *Philosophy and Objectives of the Convention*, *in* Enforcing Arbitration Awards Under the New York Convention: Experience and Prospects 8, 8 (June 10, 1998), http://www.uncitral.org /uncitral /search. html?q=new+york+convention (last visited July 23, 2008).

16. *See, e.g., Scherk v. Alberto-Culber Co.*, 417 U.S. 506, 520 note 15 (1974); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985); *Toys "R" Us*, 126 F.3d at 23, *supra* note 11.

17. *See* Neil Kaplan, *Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?*, 12 Arb. Int'l 28, 43 (1996); Vivienne M. Ashman, *UNCITRAL Initiatives to Further Harmonize and Modernize Arbitration Laws, Rules and Practices*, *in* Practising Law Institute, Litigation and Administrative Practice Course Handbook Series 635, 651 (2000); *Q&A with Albert Jan van den Berg*, 3 Global Arb. Rev. 21, 21 (2008).

18. *See* van den Berg, *supra* note 7 at 7.

19. *See* Susan L. Karmanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and the United States Courts*, 34 Geo. Wash. Int'l L. Rev. 17, 67–74 (2002); van den Berg, *supra* note 15 at 3–6. *Compare, e.g., Khan Lucas Lancaster, Inc. v. Lark Intern. Ltd.*, 186 F.3d 210 (2d Cir. 1999) *and Filanto, SpA v. Chilewich Intern. Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992); *Genesco Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840 (2d Cir. 1987).

20. UNCITRAL, Recommendation Regarding the Interpretation of Article II(2) and VII(1), http://www.uncitral. org/uncitral/en/ uncitral_texts/arbitration/2006recommendation.html (last visited July 25, 2008).

21. *Id*.

22. *Id.*

23. S.I. Strong, *Invisible Barriers to the Enforcement of Foreign Arbitral Awards in the United States*, 21 J. Int'l Arb. 439 (2007); van den Berg, *supra* note 15 at 22–23.

24. *See, e.g., Frontera Resources Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 479 F. Supp. 2d 376 (S.D.N.Y. 2007); *Transatlantic Bulk Shipping Ltd. v. Saudi Chartering S.A.*, 622 F.Supp. 25 (S.D.N.Y. 1985). *See also* van den Berg, *supra* note 15 at 22–23; Lawrence S. Schaner, John R. Schleppenbach, *Looking Back at 2007: Another Good Year for the Enforcement of International Arbitral Awards in the U.S.*, 63 Disp. Resol. J. 80, 85 (2008).

25. *See* Freyer and Gharavi, *supra* note14 at 103–07; van den Berg, *supra* note 7 at 17; van den Berg, *supra* note 15 at 14–15.

26. *See* Freyer and Gharavi, *supra* note 14 at 103–07.

27. *See* van den Berg, *supra* note 15 at 18.

28. *See Parsons & Whittemore*, 508 F.2d at 974, *supra* note 13.

29. *See* Audley Sheppard, *Interim ILA Report on Public Policy as Bar to Enforcement of International Arbitral Awards*, 19 Arb. Int'l 217, 220, 247 (2003).

30. *See* Kenneth R. Davis, *Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 37 Tex. Int'l L.J. 43, 57 (2002); van den Berg, *supra* note 15 at 15–17.

31. *Id.*

32. Courts in the United States and France have enforced awards despite that they were set aside in their countries of origin. *See In re Chromalloy Aeroservices*, 939 F.Supp. 907 (D.C. Cir. 1996); *Omnium de Traitement et de Valorisation v. Hilmarton*, reported in Y.B. Comm. Arb. XXII (1997), 696–701 (France No. 45).

33. *See Chromalloy Aeroservices*, 939 F.Supp. at 909, *supra* note 32.

34. *See, e.g., Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.* 191 F.3d 194 (2d Cir. 1999); *Spier v. Calzaturificio Tecnica, S.p.A*, 71 F. Supp. 2d 279 (S.D.N.Y. 1999).

35. *TermoRío S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 941 (D.C. Cir. 2007).

36. *See* van den Berg, *supra* note 7 at 12; Charles H. Brower II, *supra* note 5 at 973.

37. *Id.*

38. *See* Charles N. Brower, *Keynote Address at Premier Arbitration Conference*, 13 World Arb. & Mediation Rep. 270, 271 (2002), *citing* Howard M. Holtzmann, *A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards*, *in* The Internationalisation of International Arbitration, the LCIA Centenary Conference 111 (Martin Hunter et al. eds., 1995) and Stephen M. Schwebel, *The Creation and Operation of an International Court of Arbitral Awards*, in *id.* at 115.

39. *Q&A with Albert Jan van den Berg*, *supra* note 17 (explaining that he drafted an amended Convention because "the New York Convention is really ageing and . . . need[s] to be modernised, also because courts have become more critical of arbitration").

40. *See* Charles N. Brower, *supra* note 38 at 293; *Sheppard*, *supra* note 29 at 247; Freyer and Gharavi, *supra* note 14 at 114.

41. *See, e.g.,* Pieter Sanders, *The Making of the Convention*, *in* Enforcing Arbitration Awards Under the New York Convention: Experience and Prospects 3, 4–5 (June 10, 1998), http://www.uncitral.org/ uncitral/search. html?q=new+york+convention (last visited July 23, 2008); William W. Park, *Duty and Discretion in International Arbitration*, 15 Mealey's Int'l Arb. R. 28, 39 (2000) (calling for a new federal international arbitration act in the United States).

42. *See* Freyer and Gharavi, *supra* note 14 at 110.

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