THE NEW YORK CONVENTION 1958

THROUGH THE LOOKING GLASS IN 2021

By KAREN GOUGH

I've always had plenty to say about the New York Convention, and occasionally I've written about it, but I don't think I've ever been asked to speak about it before. Thank you for the invitation to address this conference today. It is indeed a pleasure and, for me, quite an honour to do so.

I am reminded daily in the course of my work in the law and frequently by my friends in conversation of the importance of history to issues arising in our day to day lives, not least in discussions about the future. What happens next? How can we know where we are going if we have no appreciation of where we came from? The appreciation of the history is vital.

Today's subject is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. It is called the New York Convention because it was signed in New York on 10 June 1958 after a long debate. Representatives from 45 UN member states attended the conference at the UN headquarters in New York between 20 May and 10 June 1958, others states and intergovernmental organisations attended as observers. At the conclusion of the Conference representatives from 24 member states signed the final text of the Convention. After accession by the requisite 3 member states, it came into force on 7 June 1959.

It is one of the UN's most important and successful private international law treaties governing international trade. It underpins the success of international commercial arbitration as the preferred means for the resolution of international commercial disputes and it has done so now for more than 60 years. I have emphasized "international" because it has no application to domestic arbitration agreements and awards. In additional, a number of signatories have availed themselves of the "commercial" exception available to participating states, and have declared and confined the application of the Convention to disputes which arise out of legal

relationships (whether contractual or not) which are defined as "commercial" under the national law of the relevant state.[1]

The New York Convention as it is known, reminds me of one of my own professional mentors, Professor Pieter Sanders from the Netherlands. He died some years ago shortly after reaching his 100th birthday. He was a remarkable jurist and a fascinating man. Those of you who know about the history of the New York Convention, will already understand the connection.

Pieter Sander's contributions to humanity were unique. He was also a lifelong practising lawyer and academic. He also had a fantastic eye for art, which is altogether another story.

Pieter was involved in the reconstruction of the Netherlands after WWII. Following his release from internment, and after the Netherlands were liberated in 1945, he took up the position of Secretary General in the office of the 1st Prime Minister of the Netherlands.

Nice, but where is she going with this some of you may ask?

I am speaking about Pieter Sanders because not least among his many achievements is that he was one of the principal drafters of the 1958 New York Convention. He was also a founding member of the International Council for Commercial Arbitration (known as "ICCA") established in 1961, and co-incidentally it is ICCA, rather than the UN, which promulgated the New York Convention, that has gathered in and maintained a library of the many decisions of national courts interpreting the Convention.

Pieter also contributed to the drafting of the 1976 UNCITRAL Arbitration Rules (which preceded the UNCITRAL Model Law on International Commercial Arbitration by 9 years). The Model Law 1985 is the foundation of the national law of arbitration in 118 different jurisdictions and 88 states, which is almost half of the countries in the world, and counting. In 1986 Pieter participated in the drafting of the

[1] Article 1, paragraph 3.

new Dutch arbitration legislation which was lauded as one of the most modern national arbitration laws of its time. Unsurprisingly that Act was largely based on the UNCITRAL Model law introduced in 1985, which itself was amended and updated only in 2006.

All of these developments in the law and practice of international commercial arbitration can be tied back to the New York Convention. Furthermore, when one looks at the enforcement provisions in the new Singapore Convention on Mediation, about which you will have already heard, you can see also the hand of the drafters of the New York Convention. Their terms, drafted 60 years apart, have marked similarities. The Singapore Convention on Mediation is mediation's equivalent of the New York Convention (or that is what is hoped for in order to underpin the success of mediation as a tool for the resolution of international commercial disputes).

In 2002, during my year of office as the President of the Chartered Institute of Arbitrators, which seems like a lifetime ago now, I had the privilege to sit with William Slate III (the then President of the AAA) and Pieter Sanders to judge the final of the Vienna Viz Moot competition. Pieter was then 90 years old. At the banquet following the conclusion of the Moot, Professor Eric Bergsten was giving a vote of thanks to Pieter for chairing the final arguments. His introduction was effusive to the point of embarrassment.

In typical, self-effacing Pieter style, he leaned over to me and said: "Karen, this is very nice but one day soon you know, I will be gone and then "poof", just like the Cheshire Cat in Alice in Wonderland, only the smile will remain."

In fact, Pieter was wrong, because beyond the enigmatic smile of the Cheshire Cat, is an enduring legacy of incalculable benefit to the international business community. The New York Convention is a legend in the arena of international treaties, arguably still the most successful international private law treaty ever made.

So, does it need to be modernized? Does it need to be replaced? Is it necessary or desirable to do anything to it at all? These are the issues for today. But before then some context…

In the rising tide of international trade following the end of the Second World War, parties sought effective tools by which to manage disputes arising from international commercial transactions. The concerns we have now about recognition and enforcement of foreign arbitration awards in non-Convention states were even larger then. There was a marked reluctance to do business with countries who did not have developed judicial systems which afforded timely recourse for the purposes of enforcing contractual obligations arising in the course of international trade. There were many such states. This clearly impacted on the ability of those states to "do business" with international partners. Those concerns about the efficacy of national court systems still remain in some parts of the world. That said, while the problem has not and is unlikely to be resolved in many states, the difficulty facing a party seeking to enforce a Convention Award, is much reduced in the sense that the substantive disputes have been dealt with by the arbitral tribunal, and what is required post award is the procedural step to obtain recognition and enforcement in the court of another Convention State.

Commercial arbitration had been in existence as a means of resolving disputes for generations, although often in a much less sophisticated style. Following the First World War it began to take on a more formal shape, and courts developed their supervisory powers over the conduct of arbitrators and the content of arbitration awards. Arbitration legislation was updated or enacted in many countries.

The 1950 English Arbitration Act (which I must confess, was the legislation governing arbitration in England when I began practice…) replaced earlier legislation and was mimicked around the Commonwealth Countries of the World. In the Caribbean either that Act or even earlier English legislation is still the foundation of national arbitration laws even today (e.g. Trinidad and Tobago, and, until 2017, Jamaica).

There were other benefits to arbitration at that time, which may be regarded as more contentious today, for example, the actual or perceived benefits of economy, speed and confidentiality. There are people who will argue about even the existence of such benefits in modern international commercial arbitration.

In 1953 the ICC prepared the text of a draft convention proposing to replace the Geneva Protocol on Arbitration Clauses of 1923, and also the Geneva Convention on the Execution of Foreign Arbitral Awards 1927. The ICC's efforts were taken over by the UN Economic and Social Council, ("known as ECOSOC") which produced an amended draft convention in 1955. The ECOSOC proposals were to adopt uniform rules on the recognition and enforcement of foreign awards.

Neither of these proposals were met with much enthusiasm and they did not progress. In 1958 therefore, representatives from 45 nations of the UN met in New York to consider a proposed text for a convention which combined both the 1953 and 1955 proposals. In the event, the official draft text prepared for the meeting was not the text from which the New York Convention emerged. Another text, known as "the Dutch proposal" was drafted by Pieter Sanders during the course of the meetings at the UN. The essence of the Dutch proposal was the production of a convention which focused on just one principle for enforcement, rather than two. Earlier drafts involved a double exequatur whereby the award had first to be shown to be enforceable in the country where the award was made, before it would be possible to seek enforcement elsewhere.

One of the fundamental objectives of the New York Convention was to establish uniform international standards for the recognition and enforcement of foreign arbitral awards in signatory countries. This afforded a successful party to an award the right to seek enforcement in any Convention country, without first having to prove enforceability in the country of the seat of the arbitration. This simplification of the enforcement regime enabled the representatives in New York to proceed to agree on the terms of the Convention.

Recent developments in the UAE have actually sought to interpret the Convention as requiring a double exequatur, but fortunately this appears now to have been resolved. A commentator at the time questioned whether the UAE court's interpretation hadn't taken "a Geneva flavor"? The very thing which was abolished by the New York Convention.

I could say here, "the rest is history". Indeed it is. Today the New York Convention has been adopted in 168 states around the world, (according to UNCITRAL that is 165 of the 193 United Nations member states plus the Cook Islands, the Holy See, and the State of Palestine). 30 states have not adopted the Convention (I'm not entirely clear about the maths here).

It is an amazing achievement but we cannot overlook the fact that it did not happen overnight, it has taken 63 years.

As we are presenting this conference in the Caribbean, and for information, the Caribbean position is that of the 13 UN listed Caribbean nation states, only 3 are not parties to the New York Convention, namely, St Lucia, St Kitts and Nevis and Grenada. The first to adopt the convention was Trinidad and Tobago in 1966, and the most recent was The Bahamas in 2006.

If you include Belize, Guyana and Suriname, as parts of the Caribbean region, albeit they are on the Central and South American mainland, Belize was the most recent state to accede to the convention just in March 2021, and Suriname has not adopted the Convention.

While St Lucia has not adopted the Convention, I understand that its provisions have been brought into effect through St Lucia's domestic arbitration law. Equally as a member of the OAS, St Lucia has reciprocal obligations regarding enforcement of arbitration awards under the governing instruments of that membership.

The substance of the New York Convention

So let's turn now to the substance of the New York Convention. What is the purpose of the New York Convention? Is it only about recognition and enforcement of international arbitration awards, or is it something more?

It's actually more than that.

Very often when we get lost in our scholarly examinations of the texts of laws and international instruments we lose perspective about their objectives. The takeaway

from this talk is that there are two very clear, and very important objectives of the New York Convention.

OBJECTIVES OF NYC

1. to recognise and enforce agreements to refer disputes to arbitration

The first, and essential objective of the New York Convention, was:

1. to introduce a regime which,… recognizing the autonomy of parties to commercial agreements to submit those agreements to arbitration for resolution, … makes provision for the enforcement of those arbitration agreements by such parties.

How is that achieved? See Article II of the Convention. By Article II of the Convention, Contracting States are required to recognize agreements in writing by which parties agree to submit their disputes to arbitration.

The term "Agreement in writing" is defined. It speaks to an agreement signed by the parties or "**an exchange of letters or telegrams**." This is of course a 1958 definition before the age of electronic communications and this engenders its own issues 60 years down the line. The meaning and interpretation of "agreement in writing" is an issue not just for the New York Convention but also the instruments which were developed on its back, arising before we all resorted to email, then text, and even Whatsapp.

The Convention requires, that the Court of a Contracting State, when seized of an action in respect of a matter that is the subject of an arbitration agreement, **shall** at the request of one of the parties, stay the action and refer the matter and the parties to arbitration. The Court is obliged to do so **unless** it finds that the agreement is "Null and void, inoperative or incapable of being performed".

Practically, national laws and procedures are drafted to provide the courts with little discretion whether to exercise their powers to order a stay to arbitration, because it is a rule of law in the implementation of the provisions of the convention, and usually also in relation to national law affecting domestic arbitration as well, that save in exceptional circumstances, if the application is made before any substantive step in

the Court proceedings has been taken by the applicant, the Court must and will stay the matter to arbitration.

So that's the first objective. Recognition and enforcement of arbitration agreements.

Recognition and Enforcement of Convention Awards

Secondly, where a party had obtained an international commercial arbitration award, the Convention sought to provide rules for the recognition and enforcement of those awards that were equal to or better than those which enabled recognition and enforcement of state to state judgments of national courts.

Article III of the Convention stipulates that each Contracting State **shall** recognize arbitral awards as binding and that it will enforce them in accordance with the rules for procedure of the territory where the award is relied on, i.e. where it is to be enforced. **This obligation is not without conditions**.

In addition to provisions to manage objections to recognition and enforcement applications, Article I(3) of the Convention also provides for Contracting States to avail themselves of reservations which limit the extent to which they will perform their treaty obligations. The two principal reservations are the "reciprocity" exception and the "commercial" exception.

In the case of the "reciprocity" exception, a Contracting State has agreed to recognize and enforce an award rendered only in the territory of another Contracting State. 80 (47%) of the Contracting States have taken this reservation.

In the case of the "commercial" exception, Contracting States which declare themselves as taking this exception agree to apply the Convention only to legal relationships, whether contractual or not, which are considered as "commercial" under the national laws of the state making the declaration. 55 (33%) of the Contracting States have taken this reservation. The term "Commercial" tends to be very broadly defined by national courts but its purpose is to exclude matrimonial and other domestic relations awards or awards on political issues.

Article IV specifies the practical requirements for applications to national courts to obtain recognition and enforcement. The focus of jurisprudence on the Convention is on Article V which provides the grounds for refusal of recognition and enforcement. If a party wishes to avoid recognition and enforcement of an award, it needs to bring itself within the exceptions contained in Article V of the Convention. Article V is split into two sections, the first has 5 grounds for refusal, including incapacity and procedural and substantive irregularities in the process or the procuring of the award. The second section deals with issues arising from the laws of the state where enforcement is sought, namely **non-arbitrability** of the dispute **or public policy issues**.

The Convention therefore is an extremely valuable tool of international trade. In practice, Contracting States are generally firm in their commitment to ensure that disputes that are the subject of an arbitration agreement, if brought before the courts, are stayed and referred to arbitration; … and awards which are subject to applications to recognize and enforce them in another Contracting State, are recognized and enforced. There are of course exceptions which prove this rule, there always will be!

Looking forward

A lot changes in 60 years

Many changes have occurred in the business of international trade and dispute resolution over the last 60 years. The Model Law has been amended, but not the New York Convention. The principal amendments to the Model Law were to modernize the definition of "Agreement in writing" to take account of communications in the electronic age. In addition, the Model law introduced a new Chapter IVA to deal in much greater detail with the powers of the Tribunal to grant interim measures. These amendments are very much reflected in modern arbitration legislation and arbitration rules both from UNCITRAL and also the major arbitral institutions.

By contrast the New York Convention, which at its heart has the provisions for the recognition and enforcement of arbitration agreements "made in writing" has still only its very dated definition of that term.

The electronic age has brought more than electronic communications. It has also, for example, imported information technology into the arbitral process and at its extreme, introduced the use of artificial intelligence to supplement the work of the tribunal. Online dispute resolution is now with us. There are many small schemes for online dispute resolution. The extent to which it is or could be used in the future to determine international commercial disputes through automated arbitration processes and awards is still not fully appreciated, less still its implications when it comes to recognition and enforcement in other Contracting States. The key benefit of the Convention is its ability to achieve enforcement of arbitration awards. The key responsibility of every arbitral tribunal is to ensure so far as it can, that it delivers a binding and enforceable arbitration award. To the extent that it is aware of the likely place of enforcement, it keeps the local law requirements in mind when deciding the dispute. Could a computer do this, and even if it did, would any award be capable of enforcement under the Convention?

Covid 19: has it presented challenges regarding enforcement

The Pandemic has brought its own special challenges. One of the grounds for seeking refusal of enforcement is that the procedure was not in accordance with the agreement of the parties or the law of the country where the arbitration took place (Art. V(d)).

The inability to hold "in person" hearings has been a serious issue for parties to arbitration during the pandemic. Some arbitration rules, which are incorporated as part of the arbitration agreement of the parties, did not provide or contemplate that hearings would be other than in person. Some legal regimes actually require the parties and the tribunal to convene within the jurisdiction to hold arbitration hearings. The evidence of a witness must be in person and not given remotely by video conference or from outside the jurisdiction.

Holding virtual arbitration hearings in those circumstances would clearly fall foul of Article V(d) if it came to an argument about enforcement.

The answer to at least some of these issues, it appears, is for the arbitration institutions to amend or clarify their arbitration rules and procedures so that the agreement of the

parties includes an agreement to hold hearings remotely where necessary and appropriate. Of course it might not always be appropriate or technically possible to do so.

Where local laws prohibit virtual or remote hearings, then the issue is a matter of local law.

Conclusion

The big question

Is the New York Convention still fit for its purpose?

Is it perfect? No, but surprisingly it is holding up very well 63 years after it was drafted. Its terms are principles based which enables Contracting States and parties to arbitration to deal with developments in the arbitral process in the underlying rules and national laws. So far, Contracting States have made their own "work arounds" to bring the modern law and practice of international commercial arbitration within the scope of the Convention.

Could it be modernized? Of course it could, but practically would that be wise because the existing 168 states would need to sign up to any changes and the main benefit of the Convention, its near universal acceptance by most of the countries in the world, could easily be damaged or destroyed.

Could an amendment in the form of a Codicil be drafted with an opt-in for Contracting States? This would preserve the integrity of the original Convention, leaving parties to sign up to it or rely on the Convention in its original form. But then again, would the presence of such an extension or optional amendment, undermine it?

Could it be replaced with a new Convention? In theory, yes. But firstly, is it really necessary? No, it is not. Secondly, and practically, it could potentially take decades to deliver a new Convention with the authority of the existing one, and in fact, it might never be achieved.

Practitioners may point to the Singapore Convention of Mediation. It has been achieved in the sense that it has been drafted and signed by 53 states to date. Six

parties have enacted legislation bringing it into force. That achievement cannot be understated. But these statistics speak for themselves. It will take years for the Singapore Convention to achieve ratification and a number of contracting parties to compare with those which have adopted the New York Convention. Meanwhile, international commercial arbitration will continue as the preferred means for the resolution of international commercial disputes and the New York Convention is the instrument which will continue to ensure its success. Firstly to enforce the parties' agreements to refer their disputes to arbitration, and secondly, and critically, the recognition and enforcement of those awards between the Contracting States, currently comprising approximately 85% of the countries in the world.

As Pieter Sanders himself said on many occasions: "*Vivat, Floreat et Crescat New York Convention 1958 [may it live, grow and flourish].*"

KAREN GOUGH,

Barrister (England and Wales), Attorney-at-law (Jamaica and Trinidad and Tobago), Chartered Arbitrator, Accredited Adjudicator, Past President of the Chartered Institute of Arbitrators.

28 May 2021

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