

The History of the New York Convention

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I. INTRODUCTION

Before dealing with the actual subject of my presentation, the 1958 New York Conference at which I participated as a delegate from The Netherlands, I would like to recall another international arbitration conference in Paris. That Congress was organized in 1961 by the Comité français de l'Arbitrage and the General Rapporteur was my unforgettable friend, Jean Robert. All those who know him remember him as a congenial colleague, an outstanding orator and an eminent arbitration specialist. ICCA was privileged to have him as its President.

Today, once again, it is the Comité français de l'Arbitrage which has invited us to Paris, this time to celebrate the fortieth anniversary of the 1958 New York Convention at an ICCA Congress. Next month, this event will also be celebrated in New York on the precise date of the birth of the Convention: 10 June. This "New York Convention Day" will take place at the headquarters of the United Nations.

This double celebration of the New York Convention in both Paris and New York is well justified. The Convention, adhered to at the moment by 116 States (with 26 extensions), is of paramount importance for international commercial arbitration. And its importance continues to grow as each year the impressive number of adherences increases as can be seen from the List of Contracting States published annually in ICCA's *Yearbook Commercial Arbitration*.

Today is not only a day of celebration for the United Nations, but also for the International Chamber of Commerce. It was the ICC that took the initiative in 1953 to draft a Convention on the recognition and enforcement of *truly international* arbitral awards. The idea of a truly international arbitral award was too progressive for the times. ECOSOC modified this concept. Its draft, which provided the basis for the New York Conference, envisioned *foreign* arbitral awards whose enforcement is requested in a State other than that where it was made. The Convention was concluded on the basis of this more limited notion. A State can limit the application of the Convention by making the first reservation, the reciprocity reservation foreseen in Art. I of the Convention.

A great number of States have made this reservation. In light of the large number of Contracting States to the Convention, these States may now consider the desirability of withdrawing this reservation. Switzerland was the first country to do so in 1993.

I have now reached the actual topic of my presentation and would like to inform you briefly of some of the events which took place at the New York Conference where the drafting was carried out during three weeks from Tuesday, 20 May to Tuesday, 10 June 1958. I will recount some of the history of the drafting of the Convention and make some observations of the effect of the Convention on arbitration law, even on national arbitration law.

II. HISTORY OF THE CONVENTION

At the time of the New York Conference I was 45 years old. Today, 40 years later, many of the delegates at that Conference are no longer with us, but their names are still alive among all who are involved in international arbitration. I would like to mention some of these names in this historical review of the birth of the Convention: *Prof. Matteucci*, who together with *Prof. Minoli* represented Italy, *Prof. Holleaux* from France, *Prof. Bulow* from Germany, *Prof. Wortley* from England, *Prof. Pointet* from Switzerland, and *Mr. Haight* on behalf of the ICC to mention only a few names.

My review of the Convention's history will deal in particular with what during the Conference was called the "Dutch proposal". It was conceived during the first weekend of the Conference. I spent the weekend at the house of my father-in-law in a suburb of New York. I can still see myself sitting in the garden with a small portable typewriter on my knees. It was there, sitting in the sun, that the "Dutch proposal" was conceived. Upon return to New York on Monday, 26 May, this draft was presented to the Conference.

At the meeting of Tuesday, 27 May, the proposal was welcomed by many of the delegates. At the meeting it was decided that the "Dutch proposal" would be the basis for further discussions. I will not go into details of these discussions and the amendments made. I would only like to mention that the Conference initially preferred not to deal with the arbitration agreement in the Convention as the "Dutch proposal" did. Preference was first given to a separate protocol, as we knew from the Geneva Protocol of 1923. Nevertheless, at a very late stage in the Conference, a provision on the arbitration agreement was inserted into the Convention, the present Art. II.

Was the "Dutch proposal" really, as Prof. Matteucci called it, "a very bold innovation"? At the time I regarded it rather as a logical follow-up to the Geneva Convention of 1927, taking into account the experience gained since then in the increased use of arbitration for the solution of international business disputes.

The main elements of the "Dutch proposal" were, first of all, the elimination of the double exequatur, one in the country where the award was made and another one in the country of the enforcement of the award. Under the Geneva Convention we always requested both. It is logical to require an exequatur only in the country where enforcement of the award is sought and not in the country where the award is made but no enforcement is sought. I remember that the disappearance of the double exequatur was so warmly welcomed during the Conference that the suggestion was made to create a new cocktail: the "double exequatur". Another element of the proposal was to restrict the grounds for refusal of recognition and enforcement as much as possible and to switch the

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burden of proof of the existence of one or more of these grounds to the party against whom the enforcement was sought. This again stands to reason because the grounds for refusal deal with exceptional cases. Logically, these grounds should be invoked by the party who opposes the *exequatur*. All of this is reflected in Art. V, the heart of the Convention.

However, nothing is perfect in this world. After 40 years of practice with the Convention, its text could certainly be improved. For example, there is no uniform procedure for the enforcement of a foreign award. The “Dutch proposal” contained some rules for this procedure. However, the Convention only states in Art. IV that the award and the arbitration agreement should be supplied and in Art. III that no more onerous conditions, or higher fees or charges should be imposed than for enforcement of domestic arbitral awards. Under the Convention the procedure is, apart from these provisions, left to the national arbitration laws of the countries where enforcement is sought. I do not propose an amendment to the Convention. It seems rather unrealistic to imagine that a consensus could be reached by the 116 Contracting States. Nor would I recommend an additional protocol which some of these States might be willing to agree upon. This would create a situation with two categories of New York Convention States. Harmonization of the Convention’s application and interpretation may be achieved by other means and in fact is taking place.

III. HARMONIZING EFFECT OF THE CONVENTION

First of all I would like to draw attention to the harmonizing effect the New York Convention has had on national arbitration legislation. This development was not foreseen in 1958. It is thanks to the UNCITRAL Model Law of 1985 which virtually repeats the grounds for refusal of enforcement of the New York Convention in its model for national arbitration legislation. This was done not only for the grounds for the refusal of enforcement of an award but virtually the same grounds apply as grounds for the setting aside of an award. The Model Law has by now been adopted by some 28 States of which 10 also did so for domestic arbitration. Therefore, the impact of the New York Convention on the Model Law has been considerable.

However, this does not apply to procedures. The rules governing the enforcement procedure and the rules governing the procedure for setting aside may differ from country to country. In both cases, the New York Convention falls back on the applicable national arbitration law. In the case of enforcement, we only have Art. III and Art. IV to which we have already referred. For setting aside, Art. V(1)(e) refers to the national arbitration laws of the country where the award was made. Apparently, falling back on national arbitration laws cannot be avoided. In my lectures for The Hague Academy in 1975, I compared international arbitration to a young bird: it rises in the air but from time to time it falls back in its nest.

Harmonization of the application and interpretation of the New York Convention could be promoted by the publication of court decisions on the Convention. This is left to the national courts. A central jurisdiction as suggested in recent years by several authors does

not exist. At the 1958 Conference this issue was not even discussed. However, as the Convention became more and more widely adhered to and court decisions started to appear, it became apparent that a compilation of national court decisions on the New York Convention would be useful. Such a publication would reveal different interpretations and, by making them public, might lead to some degree of harmonization. In addition, publication of these national court decisions might also be useful for the choice of the place of arbitration in an international arbitration.

In 1976, I was present at the United Nations again, this time as a consultant for UNCITRAL for the drafting of its well known UNCITRAL Arbitration Rules. I approached the United Nations asking whether they would be prepared to start such a publication. A publication of court decisions on the New York Convention, although not a replacement for a central jurisdiction, would be at least a kind of alternative. However, this was not envisaged.

This was quite possibly the main reason why in 1976 on behalf of ICCA I started with the *Yearbooks* of ICCA. Today, in the 22 volumes that have appeared since 1976, 728 court decisions on the New York Convention, coming from 42 countries, have been published in extract form. Times have changed. Today the United Nations may be complimented for its recent initiative to publish CLOUT – an abbreviation of Case Law on UNCITRAL Texts – which compiles in short extracts of national court decisions on UNCITRAL texts, including, *inter alia*, its Model Law on International Commercial Arbitration.

Harmonization of court decisions on the New York Convention has thus been one of the aims of the ICCA Yearbooks. It was also an underlying purpose of the well known treatise by Van den Berg, originally a dissertation at my university, the Erasmus University of Rotterdam. The full title of this work is, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*. A second edition will soon appear and I expect it will reveal that some harmonization has indeed been achieved.

It is time to conclude my introduction on the birth of the New York Convention. I’ve shared some memories of the Conference of 1958 to which I added some views on the future. Business is grateful to the United Nations for having provided it with this instrument in a world where arbitration is increasingly resorted to for the resolution of international commercial disputes. To end in a language formerly used in the broad international context:

Vivat, Floreat et Crescat New York Convention 1958!