

Enforcing Arbitration Awards
under the
New York Convention

**Experience and
Prospects**

This volume contains the papers presented at "New York Convention Day".
That colloquium was held in the Trusteeship Council Chamber of the United Nations Headquarters,
New York on 10 June 1998 to celebrate the 40th anniversary of the Convention
on the Recognition and Enforcement of Foreign Arbitral Awards
concluded on 10 June 1958.



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I. The birth: forty years ago

Chaired by Dumitru Mazilu
Ambassador, Ministry of Foreign Affairs, Romania

Opening address commemorating the successful conclusion of the 1958 United Nations Conference on International Commercial Arbitration

KOFI ANNAN
Secretary-General of the United Nations

It gives me pleasure to welcome you to this special meeting of the United Nations Commission on International Trade Law (UNCITRAL) devoted to the New York Convention.

On this day 40 years ago, a diplomatic conference convened by the United Nations in New York concluded the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Today's meeting marks that anniversary and offers an opportunity to review our experience with the Convention, to take stock of current issues in the field and to consider our future work.

We are honoured that leading arbitration practitioners and experts are here today to share with us their views. I would like to welcome two distinguished experts who participated in the drafting of the Convention as government delegates: Professor Pieter Sanders, of the Netherlands, and Dr. Ottoarndt Glossner, of Germany.

I am also happy to greet Mr. Fali Nariman, President of the International Council for Commercial Arbitration (ICCA), as well as his colleagues on the Council. The ICCA has championed the cause of international commercial arbitration for some 35 years, contributing greatly to the work of UNCITRAL.

Also joining us today are representatives of the International Court of Arbitration of the International Chamber of Commerce (ICC) in Paris, headed by its Chairman, Dr. Robert Briner. Indeed, the Symposium today would be incomplete without the ICC, for it was an initiative of the ICC itself that prompted the United Nations in 1953 to prepare an international treaty on arbitral awards.

The ICC has become an even closer partner of the United Nations in recent months, as part of my efforts to enhance ties with the private sector. The ICC understands that business has a compelling interest in the United Nations work for peace and development, in our technical standard-setting and in our efforts to harmonize and modernize the rules of international trade. That is why, earlier this year, the United Nations and ICC issued a statement pledging to work jointly to expand economic opportunities worldwide and to promote investment in selected least developed countries.

UNCITRAL, for its part, has a strong tradition of obtaining input from the private sector. In UNCITRAL's early years, arbitration was not accepted in all parts of the world as an alternative to the judicial settlement of international commercial disputes. Rather, the practice was often ignored or approached with reservation or suspicion, which in turn became a hindrance to the development of international trade. The work of UNCITRAL, drawing in part on the expertise of the private sector, has helped dispel such doubts. Today, international commercial arbitration has a new prominence.

It is my hope that such cooperation will continue. The participation of the private sector is essential: not only during the preparation of texts dealing with the needs of the global business community, but also once they have been finalized. I would like to take this opportunity to encourage private sector organizations to be much more active in promoting the legislative consideration and enactment of such texts.

Let me turn now to the subject of today's discussions, the New York Convention. This landmark instrument has many virtues. It has nourished respect for binding commitments, whether they have been entered into by private parties or governments. It has inspired confidence in the rule of law. And it has helped ensure fair treatment when disputes arise over contractual rights and obligations. As you know, international trade thrives on the rule of law: without it parties are often reluctant to enter into cross-border commercial transactions or make international investments.

For all these reasons, the Convention is one of the most successful treaties in the area of commercial law, adhered to by 117 States, including the major trading nations. It has served as a model for many subsequent international legislative texts on arbitration. And it proved to the world, as early as the 1950s, that the United Nations could be a constructive, leading force in matters affecting relations among States and among commercial actors on the world scene.

Still, a number of States are yet to become parties to the Convention. As a result, entities investing or doing business in those States lack the legal certainty afforded by the Convention, and businesses cannot be confident that commercial obligations can be enforced. This increases the level of risk, meaning that additional security may be required, that negotiations are likely to be more complex and protracted, and that transaction costs will rise. Such risks can adversely affect international trade.

So while we proudly commemorate the Convention and reaffirm our commitment to its tenets, we must also acknowledge that the ultimate goal of the United Nations with regard to the Convention has not yet been achieved. There is a need to promote the Convention so that the gaps in its membership are filled. I hope that this New York Convention Day will be successful in persuading Governments that have not yet joined the Convention to do so as soon as possible.

The General Assembly declared the period 1990-1999 to be the "United Nations Decade of International Law": a decade in which to make a special effort to advance the development and codification of international law; and in which to raise public awareness about the role of international law in our daily lives.

This gathering is a significant contribution to the Decade.

You have gathered to reaffirm the commitment of the international community to the New York Convention, but also to international law as one of the main pillars

of the United Nations global mission. And you have gathered during a remarkable year: a year in which we also mark the fiftieth anniversary of the Universal Declaration of Human Rights and of the Genocide Convention, and in which efforts to establish an international criminal court are ever so close to fruition.

In that spirit of progress, but without minimizing the tough work ahead, I offer you my best wishes for a productive discussion and a pleasant stay at the United Nations Headquarters.

The making of the Convention

PIETER SANDERS

Delegate at the 1958 Conference; Honorary President, International Council for Commercial Arbitration

Celebrating 40 years of the New York Convention 1958 brings us back to its origin. In 1953 the International Chamber of Commerce (ICC) produced a first draft. Therefore the ICC also has an anniversary, celebrating today the 45th anniversary of its draft. The ICC draft was presented to the United Nations Economic and Social Council (ECOSOC). It was a draft Convention on the Recognition and Enforcement of International Arbitral Awards. This notion of an international arbitral award was at the time too progressive a concept. ECOSOC changed it into a draft for a Convention for the Recognition and Enforcement of Foreign Arbitral Awards. It was this ECOSOC draft of 1955 which was submitted to the International Conference which lasted three weeks from Tuesday, 20 May to Tuesday, 10 June 1958 and was held at the United Nations Headquarters in New York. The Conference was chaired by the Dutch Permanent Representative at the United Nations, Willem Schurmann. Oscar Schachter functioned as Executive Secretary.

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 of us who are involved in international arbitration. Some of these names I may mention in this historical review of the birth of the Convention: Professor Matteucci, who together with Professor Minoli represented Italy, Professor Holleaux from France, Professor Biilow from Germany, Professor Wortley from England, Professor 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 that 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 my 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, this proposal was welcomed by many of the delegates. The meeting 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 will only mention that the Conference, initially, preferred not to deal

in the Convention with the arbitration agreement, as the Dutch proposal did. Preference was first given to a separate Protocol, as we knew from the Geneva Protocol on Arbitration Clauses (Geneva, 1923) (the 1923 Geneva Protocol). Nevertheless, at a very late stage of the Conference, a provision on the arbitration agreement was inserted in the Convention, the present article II.

Was the Dutch proposal really, as Professor Matteucci called it, "a very bold innovation"? At the time, I regarded it rather as a logical follow-up of the Geneva Convention on the Execution of Foreign Arbitral Awards (Geneva, 1927) (the 1927 Geneva Convention), 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 enforcement of the award. Under the 1927 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 also in the country where the award was made, but no enforcement is sought. Another element of the proposal was to restrict the grounds for refusal of recognition and enforcement as much as possible and to switch the 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.

However, nothing is perfect in this world. After 40 years of practice with the Convention its text could certainly be improved. For example, one could consider the introduction of uniform rules for the procedure of enforcement. In this respect, the Convention only contains the requirement that the award and arbitration agreement shall be supplied to the court (article IV) and that no more onerous conditions or higher fees should be imposed than when enforcement of a domestic award is sought (article III).

For the rest, the procedure is left to national arbitration law. There does not exist a central jurisdiction for the enforcement of New York Convention awards as in recent years has been suggested by several authors. At the Conference of 1958 this idea was not even discussed.

I do not propose an amendment of the Convention. It seems rather unrealistic that a consensus may be reached by the 117 States. Neither would I recommend an additional Protocol which some of these States might be willing to agree upon. This would create a situation of two categories of New York Convention States.

Rather, I would recommend relying on harmonization of the Convention's application and interpretation on those issues on which the Convention falls back on national arbitration law. I refer, in particular, to the fifth ground for refusal of enforcement contained in article V(1): the award has been set aside in the country where the award was made under the arbitration law of that country. Falling back on national arbitration laws apparently cannot be avoided. In my Lectures for the Hague Academy in 1975, I compared international arbitration with a young bird. It rises in the air, but from time to time it falls back on its nest. In my opinion this still applies today.

Harmonization of national arbitration law is indeed taking place. In particular, harmonization has gained momentum since the appearance in 1985 of UNCITRAL's Model Law on International Commercial Arbitration (the Model Law), now adopted by some 28 States, of which some 10 did so for domestic arbitration as well. The Model Law virtually repeats the grounds of article V of the Convention, not only for

enforcement (article 36) but also for setting aside (article 34). We did not foresee this effect of the Convention in 1958.

Harmonization of the application and interpretation of the Convention can also be furthered by the publication of court decisions on the Convention. 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 Convention would be useful. Such a publication would reveal different interpretations and, by making them public, might lead to some 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 consultant to UNCITRAL for the drafting of its today 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 Convention, although not replacing a central jurisdiction, would be at least a kind of alternative. However, this was not envisaged.

This was one of the reasons, maybe even the main reason, why in 1976 I started on behalf of ICCA with the Yearbooks of ICCA. By now, in the 22 volumes that have appeared since 1976, 728 court decisions on the 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*, including, *inter alia*, its Model Law. Harmonization of court decisions on the Convention is also envisaged in the well known Treatise of 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 indeed some harmonization has been achieved.

It is time to conclude my introduction on the birth of the New York Convention. I recalled some memories of the Conference of 1958 and added some views on the future which, in my opinion, lies in harmonization. Looking back on 40 years, the Convention has been a great success and, as a whole, works satisfactorily. The business world is grateful to the United Nations for having provided it with this instrument in a world where arbitration is more and more resorted to for the solution of international commercial disputes. To end in a language, once common to all civilized nations: *Vivat, Floreat et Crescat New York Convention 1958*.

From New York (1958) to Geneva (1961)—a veteran's diary

OTTOARNDT GLOSSNER

Delegate at 1958 Conference

Honorary President, German Institution for Arbitration

I wish to focus on the human factor, on those involved in the Conventions.

Lord Tangle (Sir Edwin Herbert), a world renowned English solicitor and my immediate predecessor as president of the International Chamber of Commerce

(ICC) Commission on International Arbitration, and Frederic Eisemann, Secretary General of the ICC Court of Arbitration and Secretary of the ICC Commission, both were members of the ICC delegation in New York.

In the aftermath of the war, Frederic Eisemann had recognized early on that the League of Nations' Protocol on Arbitration Clauses and the Convention on the Execution of Foreign Arbitral Awards, both of Geneva of the 1920s, did not sufficiently free international arbitration of the legal strings. As a man of vision he requested a denationalized, international arbitration award, but finally accepted with grace that the world was not ready to go beyond the concept of a foreign arbitration award.

Today, 40 years later, in the age of the borderless internet, the world is challenged again to accept a denationalized arbitration award.

Ambassador Schurmann, as the elected chairman of the conference, had to shoulder the Herculean task, after five years of preparation, of presenting for signature a Convention within three weeks by orchestrating some 50 delegations, most of them diplomats accredited to the United Nations like himself and not particularly conversant in matters of arbitration on the one side and a very small group of highly sophisticated experts of arbitration on the other. He was at his best when he had to curtail delegates' rhetoric, which he did often, but gently, as if he were conferring a decoration.

Ambassador Schurmann combined his skills of a brilliant diplomat with the comprehensive knowledge of an outstanding expert and fellow-countryman, Pieter Sanders who, well-known for his Cartesian shrewdness of mind, experienced in the practice of an all-round jurist and arbitrator, became his ideal partner. They handled the agenda with pragmatism and unspectacularly with considerable success.

Mario Matteucci, director of the League of Nations Institute for the Unification of Private Law in Rome and an academic of highest international standing, had teamed up with Eugenio Minoli, an all-round legal wizard and one-time adviser to the Holy See, who opened new horizons for a modern approach to arbitration in Italy by way of legislation and jurisdiction.

Benjamin Wortley, Professor of Commercial Law and Niel Pearson, a legal practitioner of sorts, both domiciled in Manchester, England, were known for their immense efficiency in formulating the most curiously sounding proposals into palatable English. On a more personal vein, I shall never forget when Ben Wortley, at the beginning of a morning session, after a long night's debate, claimed to feel somewhat dull in his head, yet presented immediately thereafter a brilliant solution to the problem that had arisen the day before.

Conseiller d'Etat Georges Holleaux, a French academic in the best sense of the word, the very picture of the elegant Senior French Legal Officer, who was joined by Rene Arnaud, a true product of one of the French elite schools, a practitioner-economist, and the co-founder of the ICC in 1918, were the most appropriately chosen delegates to take the responsibility for an impeccable French version of the Convention. They were both partisans for a *renouveau* in France in international arbitration which later, through their efforts and those of Jean Robert, materialized in legislation and jurisdiction.

Arthur Biilow, the authority on the law of civil procedure in the Federal Ministry of Justice in Bonn and later its Permanent Secretary, had requested me to become

a member of the German delegation to New York as representative of the Federation of German Industries. This turned out to be a perfect match between legislator and legal practice. Although not always agreeing on the detail, we worked together happily on the grand scale in the long days and, in view of the time constraints, sometimes long into the night.

Martin Domke, Vice-President of the American Arbitration Association, conversant in the legal world on both sides of the Atlantic, had to face the United States reluctance to accept international arbitration. It was he who familiarized American trade and commerce with the practice of international arbitration, so much so that in the end the United States Government ratified the Convention relatively early, in 1970 and opened thereby the gates for legislation and jurisdiction in international arbitration in the United States. Martin and I had a special relationship as he—in his young days—was assistant professor to Ernst Heymann, my wife's grandfather.

His Excellency, the Very Reverend Monsignor James Griffith, who represented the Holy See, was seated next to the German delegation. He was a shining example of the multicultural virtues of the Vatican. In his clerical garb as a high officer of the Church, a lean figure of a Pio Dodicesimo stature, he sought and received from the German delegation, in a good neighbourly way, occasional advice by silent consent or congenial nods on matters of principle and formulation. At the end of the negotiations, he assured us that the Convention, as a means of bringing peace into the world of trade and commerce, would be ratified by the Vatican however late, which happened *en effet* in 1975.

Simultaneous with the initiative of ECOSOC in New York, Frederic Eisemann had seized the Economic Commission for Europe (ECE) in Geneva to begin work for a European Convention on International Arbitration in order to overcome the virtual speechlessness throughout a sharply divided Europe—between the European Union in *statu nascendi* and the Soviet block. After 10 June, 1958 the Governments decided to go on with the Geneva negotiations to directly address details of arbitration procedure. With the winds of the Cold War blowing in the European theatre, an atmosphere of mutual distrust lay heavily upon the negotiations, which led, at certain stages, to a virtual standstill in the activities of the delegations. It was then the unforgettable achievement of Lazare Kopelmanas, Secretary of the Conference, to steer the negotiations into quiet waters by reaching for what was feasible in the circumstances. The situation produced some curious results, such as the nomination of arbitrators in a "Nominating Committee", an East-West revolving body, which I had the honour to preside over for 30 years. Immediately after the signature of the Geneva Convention in 1961, the Western European Nations hastily convened a Conference in Paris in 1962 which, under the "Paris Agreement", retracted part of the nominating mechanism.

Nonetheless, the Conventions, in particular the New York Convention, in these years became a solid vehicle for international arbitration throughout the world. Virtually all delegates through the long negotiations, notwithstanding their differences, moved from mutual respect to friendly and long-lasting relationships. A splendid proof is the birth of the International Council for Commercial Arbitration (ICCA).

In referring to some of the people involved, I intended to praise them all, up to the last office hand, for their extraordinary performance in working towards the achievement of this Convention, which in its kind turned out to become a success story of our times.

II. The value: three assessments

Chaired by Tang Houzhi

Vice-Chairman, China International Economic and Trade Arbitration Commission

Philosophy and objectives of the Convention

ROBERT BRINER

Chairman, International Court of Arbitration of the International Chamber of Commerce

International commercial arbitration is the servant of international business and trade. It was therefore only normal that the newly created International Chamber of Commerce (ICC) in 1923 set up an arbitration system in order to encourage the settlement of disputes arising from international trade. The development of ICC arbitration is demonstrated by the fact that the ICC Court received on 8 June 1998 Case No. 10,000 concerning a dispute between a North American claimant and several respondents from an East European former socialist country. The ICC also worked closely with the competent organs of the League of Nations in drafting the Protocol on Arbitration Clauses (Geneva, 1923) and the Convention on the Execution of Foreign Arbitral Awards, (Geneva, 1927).

As the Secretary-General already was kind enough to mention, the ICC in 1953 took the initiative and submitted to the United Nations the draft of a Convention on the Recognition and Enforcement of International Arbitral Awards.

Let us turn to the objectives of the New York Convention: to serve international trade and commerce.

Forty years later there can be no doubt that the Convention has been, and still is, a great success. By and large the enforcement of awards is considerably easier than the enforcement of judgements rendered by national courts. Presently more than 117 countries have ratified the Convention, among them most major trading nations and many others from all regions of the world, including from Latin America, a continent long hostile to international arbitration but where we have in recent years experienced spectacular growth.

Let us now briefly identify some areas where improvements could conceivably take place in order to further assist the international exchange of goods and services, therefore the objective pursued in 1953/58.

One main shortcoming of the Convention is the obvious lack of an efficient, universal enforcement procedure.

Judges Howard Holtzman and Stephen Schwebel, five years ago, as a vision for the next 100 years, proposed the creation of an international court for resolving disputes on the enforceability of arbitral awards. Here and today it would seem more prudent to be less visionary and to concentrate on the next ten years, leaving further topics to the discussion of the 10th of June of 2008.

International commercial arbitration is presently confronted with two main challenges.

Globalization and privatization have produced an ever-growing number of parties to international transactions, with all the disputes and litigious phenomena this entails. The new actors on the international scene lack experience. The reservoir of arbitrators in many parts of the world is small and they are often not properly equipped and educated. In 1997, less than 60 per cent of the parties to ICC arbitrations came from Western Europe and North America, but more than 85 percent of the arbitrators nominated were domiciled in these regions and in almost 90 percent of the cases the seat of the arbitration was chosen in the western part of the world. To a large degree these choices are made by the parties themselves. This imbalance is due to a certain lack of confidence by the new players in arbitrators from their own regions, and the widespread lack of confidence in the national legislation and court systems in many parts of the world. The necessary change will take time and much effort, and will not be spectacular. In the interest of the acceptability and effectiveness of international commercial arbitration it is imperative, however, that this change takes place.

The other problem lies in the breakdown and asphyxia of the court systems in many parts of the world. This, more than ever, forces international business to resort to arbitration which, contrary to many preconceived ideas, is faster than court litigation with its congestion, two or three instances and often procedural idiosyncrasies. Arbitration is also cheaper in the overall balance than litigation before State courts. Although one will have to pay the arbitrators and possibly the arbitral institution, legal fees will be lower because of the more concentrated, shorter proceeding, the foreign party does not need to instruct local counsel and the shorter the proceeding, the less time is spent by management, an important cost factor.

In view of this congestion, all steps should be encouraged which will reduce the involvement of the courts in arbitration cases. There exists no real reason why the supervisory function of the courts should also be exercised at the place of the arbitration instead of only at the places of enforcement. There exists no real reason why the enforcement judge should apply other criteria than that of international public policy when examining a request for enforcement. There exists strictly no real reason why a party, which freely entered into a commercial transaction envisaging resolution of disputes by arbitration, should be allowed to opt out of its bargain with often spurious arguments, so that the dispute ends up in the courts.

Modern legislation, like the UNCITRAL Model Law and new acts like the English and the Indian 1996 Arbitration Acts, go a great way on this path, but the proof of the pudding is in the eating. Even with new legislation which encourages arbitration, some judges are still caught in bygone protectionist habits.

Parallel to these steps, more thought has to be given to the role which mediation and conciliation can play, not to replace arbitration, but to respond to specific needs and expectations, also in the international commercial area, whenever there is no need for an enforceable award.

Attention also should be given to better ways to resolve disputes of a small material value. These are all small, unspectacular steps.

Reverting to the visions of Judges Holtzman and Schwebel for the next hundred years, one might want to dream about ways to effectively tackle the multi-party

problem, to use arbitration in tort situations, especially in infringement matters, and find ways for effective enforcement of interim and protective measures and of procedural orders taken by arbitrators, for instance, regarding the taking of evidence.

As international business continues to grow, international commercial arbitration will grow. It is up to us practitioners to make the users feel even more comfortable with arbitration as the only realistic method to resolve international commercial differences. Our work is not spectacular, there are no easy fixes. One cannot take a helicopter to avoid the difficulties and pitfalls of the journey up the mountain, one has to put one foot in front of the other on the long way to the peak or, as Deng Xiaoping said: "to cross the river by touching each stone".

The Convention[^] contribution to the globalization of international commercial arbitration

FALI S. NARIMAN

President, International Council for Commercial Arbitration

The New York Convention has come through with four splendid decades of global achievement.

I like to think of this occasion not only as a birthday celebration, but also as a commemoration of a most successful partnership—a partnership forged by three basic documents: the New York Convention (1958), the UNCITRAL Arbitration Rules (1976), and the UNCITRAL Model Law on International Commercial Arbitration (1985).

In my written summary prepared for this New York Convention Day, I set out the salient contributing factors to the globalization of the Convention, and at the end of it I suggested four or five questions which need attention in the years ahead.

I will consolidate them all into one, because of the constraints of time and for fear of the fate of Socrates. The latter concerns a much told story about an essay of a school boy who was asked to write all he knew about Socrates. And this is what he wrote: "Socrates was Greek. He asked too many questions. So they poisoned him." The one question that I deal with then is:

In the years ahead can the Convention hope to achieve a greater globalization of concepts and approaches?

Not likely. As Mr. Pieter Sanders reminded us a few moments ago, the Convention was drafted in an imperfect world—and if I may add, an imperfect world of sovereign nation States. And after forty years, and with more than 117 ratifications, it still remains an imperfect world of sovereign States! State sovereignty is a major barrier to the development of any universal rule of law. Secondly, one must not expect too much from an international convention like the one whose anniversary we celebrate today. It was deliberately so fashioned as to facilitate easy application of its provisions to varied and different legal systems around the globe. After the Conference in New York ended in June 1958, a brief Mission Statement was issued as

to what the draft provisions hoped to achieve—with befitting humility, it said: "Worldwide simple enforcement of arbitral awards." That's all. And the simplest way for recognition and enforcement of foreign awards was working through, and taking the assistance of, the national courts in Contracting States. As the Secretary-General said in his address this morning, "the Convention has inspired confidence in the rule of law": those who expect more may be disappointed.

Many of us here would recall an anniversary celebration in London a few years ago when, tilting at the windmills of national sovereignty, a suggestion was made for the creation of a new international court that would take the place of municipal courts for resolving disputes concerning international commercial arbitration. I came away greatly impressed by the "dream" of Judge Holtzman and Judge Schwebel.

But a recent event has convinced me that the suggestion made at the London Court of International Arbitration centenary meeting in 1993 would leave us much worse off than we are at present. The event concerns another United Nations Convention, the Vienna Convention on Consular Relations of 1963, also regarded as a successful multilateral treaty. It has even more adherents to it than the New York Convention—160 States are parties to the Vienna Convention on Consular Relations. And there is also an Optional Protocol. The Protocol provides that disputes arising out of the interpretation or application of the Vienna Convention shall lie within the compulsory jurisdiction of the International Court of Justice, and may be brought before that Court by any party to the dispute, who is also a party to the Protocol.

The United States of America and the Republic of Paraguay are both parties to the Vienna Convention of 1963 as well as to the Optional Protocol. Some years ago a Paraguayan national, Angel Francisco Breard, was arrested, charged, tried and sentenced to death for murder by a State Court in the Commonwealth of Virginia in the United States. Neither at the time of his arrest nor at his trial was he informed by the detaining authorities of his rights to consular assistance (a mandatory requirement of article 36 of the Vienna Convention). On getting information about Breard only when he was on death-row, Paraguay instituted a suit in the Federal District Court of Virginia, questioning the legality of the conviction and sentence: it appears that Breard, not being informed of his right to consult with the consular representative of Paraguay in the United States, had confessed to the murder with which he was charged because of his belief that such a confession would invite a lesser sentence *viz.* that of life imprisonment: a belief prompted by the criminal law and practice in his home State, Paraguay.

The Federal District Court dismissed the suit on the ground that it had no jurisdiction to review on merits criminal proceedings in United States State courts. Paraguay appealed, and the United States Government then intervened raising a more basic question—it said that domestic courts in the United States had no authority to deal with any alleged violation of an international convention—this could only be dealt with, if at all, by the International Court of Justice (ICJ). The dismissal of Paraguay's suit was affirmed by the United States Circuit Court of Appeals. Meanwhile the date for execution of Breard had been set by the Governor of the State of Virginia for 14 April, 1998.

So, on 3 April 1998, Paraguay instituted proceedings against the Government of the United States in the ICJ alleging a violation of the Vienna Convention with respect to the same Angel Breard. Pending hearing of its complaint, Paraguay also requested the ICJ for prompt provisional measures staying the execution of the death

sentence. The Governments of both States participated in the brief hearings before the ICJ—leading to a legitimate expectation that the order ultimately passed would be respected by the Party States. On 9 April 1998, the ICJ handed down a reasoned order—all fifteen Judges voted unanimously that the Court had jurisdiction over the subject-matter of the complaint and that pending its final determination by the Court, the United States should take all measures at its disposal to ensure that Breard was not executed and should also inform the Court of all measures which had been taken in implementation of the order.

A writ petition was then filed in the United States Supreme Court by Paraguay to enforce the order of the ICJ—that is, to stay the execution of the death sentence. But the petition was denied. In a majority decision (6:3) the Court said that there was no "law" that compelled enforcement of the order of the ICJ, and added:

"If the Governor [i.e. the Governor of the State of Virginia] wishes to wait for the decision of the ICJ that is his prerogative. But nothing in our existing case law allows us to make that choice for him."

Breard was promptly executed at nine in the evening of the day originally set for his execution—14 April, 1998. The pending case before the ICJ had become moot.

The great Justice Holmes once said that the prophecy of "what the Courts will do in fact and nothing more pretentious is what I mean by the Law". What the world's highest court has done, and what the world's most powerful court has said, in the case of Angel Breard, firmly establishes the following.

First, that so long as sovereign nation States exist, decisions in respect of any international or transnational dispute can only be enforced through sovereign national courts, not otherwise, a fact repeatedly (and so rightly) stressed in the carefully drafted provisions of the Convention.

Secondly, even a unanimous decision of an international court rendered in a dispute between two sovereign States, in exercise of that court's consensual compulsory jurisdiction, has no greater validity or force than a polite request, sovereign nations still being really and truly sovereign. Any order of an extra-national authority, howsoever pre-eminent, is simply unenforceable if the Government of a nation State chooses not to comply with it. And national sovereignty is the genetic code-word of every nation State, not only that of the United States of America.

The problem about an efficient international or transnational court is that it is a creature of independent, absolutely sovereign States; and independent sovereign States act too often like billiard balls which *have* to collide, not cooperate. In the foreword to a book published by Kluwer in 1996, commemorating the 50th Anniversary of the International Court of Justice, its then President wrote frankly about its infirmities. He said that the Court carried with it "a genetic heritage rendered vulnerable by the chromosomes of State sovereignty".

I pay tribute today to the foresight and wisdom of the framers of the Convention, for having recognized way back in 1958 the singular importance of sovereign national courts to whom its main provisions are addressed. They saw, long before anyone else had, that the "genetic heritage" of national courts could not be ignored, that without the aid and assistance of local municipal courts transnational arbitral awards could not be effectively enforced.

And after forty years the scene has not changed. What is needed to achieve a greater globalization of the Convention is strengthening the support system—for instance, by a wider dissemination of the advantages of the UNCITRAL Model Law. Till then, we will just have to be content with the present regime of different national courts operating under different legal systems, giving recognition to and enforcing foreign arbitral awards—and on rare occasions surprising us by *not* doing so.

Benefits of membership

EMILIO J. CARDENAS

Ambassador, Argentina

Exactly forty years ago, on 10 June 1958, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards came into being within the United Nations. Today, it is precisely that anniversary which brings us together.

I have been entrusted with a particularly straightforward task, which can be briefly discharged. It is to outline the benefits accruing to those States which ratify or accede to this instrument, not so much from a legal standpoint but from the standpoint of a businessman.

It is a well-known fact that the international economy, over the last three decades, has undergone dramatic transformations, which have been more rapid and far-reaching than at any time during the last forty years, that is, since history saw the appearance of the science of economics.

The process which we term "globalization" has brought about changes with regard to the production of goods and services that are genuinely revolutionary. But it has also strengthened the capacities of operators in the private sector; so much so that one now has the impression that the very nature of the role of the State in economic affairs has altered significantly, since there are processes and markets which clearly transcend it and where, as never before, the State is unable to dominate and has no controlling power.

Technology, the explosion of knowledge, information science and communications have transformed, and even obscured, what was once the traditional importance of frontiers, by bringing economic transactors closer together and speeding up the internationalization of production processes and business dealings in general.

Formal and informal international mergers, strategic alliances, partnerships and associations of all kinds, whether for the production of goods, the provision of services, research and development, or trading in goods and services, are becoming ever more frequent and widespread. What is more, they no longer respect frontiers, as the media have suddenly and extensively begun to report, but without anyone being surprised, as if it were something quite natural.

Against this broadened background, the concept of legal certainty has suddenly assumed genuinely exceptional significance. It has given prominence to the formation of the contract as the backbone of trading relationships and their governing law.

Also, it has significantly reinforced the relative importance of methods for resolving disputes in general and that of the mechanism of arbitration in particular.

It is indeed difficult to be able to place one's trust blindly in local courts of law when the economic outcome of business transactions that have an international dimension is involved, since there is a very real possibility of encountering local bias or partiality, which is not the exclusive preserve of any one region or system. It is a harsh reality which can sometimes appear in any area at all, regardless of the different social or cultural patterns in which it may manifest itself.

It is within such a setting that arbitration often proves to be the only viable option and one where the Convention that brings us together today thus takes on renewed significance, because it has become a fundamental and key element of the essential minimum degree of legal certainty to which I have just referred and without which the very system of private ownership and the necessary stability of business practice are undermined.

Unless it is ensured that foreign arbitral awards, whether ad hoc or stemming from permanent bodies or arrangements, can be recognized and enforced even outside the State in which those awards are pronounced, a State places its traders and enterprises at a clear competitive disadvantage when they do business on an international scale. They will obviously be vulnerable if they are unable to ensure the effectiveness and efficiency of arbitration agreements in the case of transactions having an international dimension, the number of which has been increasing exponentially.

The modern State can thus be seen to have an inescapable responsibility—or rather an essential need—to provide its private sector with the necessary instrumental framework to enable it to compete with its foreign counterparts without being disadvantaged. The State is required to play a pro-active role in this respect. That role must be assumed with a dynamic, if not aggressive, attitude in order that the private sector can take full advantage of the opportunities afforded by the international market.

The New York Convention without doubt incorporates the necessary combination of rules and procedures that has to be available to commercial operators. Without such a convention, it is indeed difficult to do business in today's borderless world.

It accordingly offers something more than just an advantage. It represents, rather, an essential tool for competing in the increasingly liberalized environment of international trade between private individuals. It is, therefore, nothing less than a necessity. It is—and here Robert Briner is right—the new predominant vision within our continent of Latin America, and, naturally, outside it.

III. The effect: enforceability of arbitration agreements and arbitral decisions

Chaired by Haya Sheika Al Khalifa
Attorney, Bahrain

New developments on written form

NEIL KAPLAN
Chairman, Hong Kong International Arbitration Centre

The New York Convention requires an arbitration agreement to be in writing. Article II (2) of the Convention states:

"the term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement *signed* by the parties or contained in an *exchange* of letters or telegrams." (emphasis added)

The concept adopted 40 years ago is thus one of signature or exchange.

It appears to be common ground that the definition of writing contained in article II (2) does not conform with international trade practices. Excluded from the definition would be Bills of Lading, certain Brokers Notes, salvage situations, the "battle of the forms" and the general concept of tacit acceptance.

I hasten to add that one is not here dealing with the wider issue as to why the agreement to arbitrate must be in writing, whereas the underlying contract is frequently made orally. Rather the issue is why, if a written contract containing an arbitration clause is sent by A to B, and B does not sign nor engage in an exchange, but fully complies with all other contractual terms, B should be taken to agree to everything except the arbitration clause? As Dr. Blessing put it in his recent ICCA paper, "it is absurd to conclude that B accepted all minus one term". It is interesting also to observe that Professor Sanders thought that this problem might arise, because he made a proposal to the Convention drafters that would have covered this very situation. He wanted to add, "confirmation in writing by one of the parties without contestation by the other party". Unfortunately his sensible suggestion was not accepted.

When drafting article 7(2) of the UNCITRAL Model Law, there was an opportunity to go further, especially as in 1981 the UNCITRAL Secretariat raised the issue of a more precise and detailed definition "in view of the difficulties encountered in practice". However, article 7(2) retained the dual concepts of signature or exchange. This was despite some very powerful and authoritative statements that the Model Law definition would continue to exclude many forms of conducting international business. Even with the benefit of hindsight, I think it was a shame that article 7(2) did not deal with this problem.

However, in this regard, States have taken a lead. A number of arbitration Statutes passed during the last 10 years or so have included a wider definition of the

writing requirement. Time does not permit me to mention more than just a few of the jurisdictions where this has occurred.

Article 1021 of the Netherlands Arbitration Act 1986 provides that the arbitration agreement shall be proved by an instrument in writing, but importantly adds,

"For this purpose an instrument in writing which provides for arbitration or which refers to standard conditions providing for arbitration is sufficient *provided* that this instrument is expressly or impliedly accepted by or on behalf of the other party." (emphasis added)

Article 1781 of the Swiss Private International Law Act, whilst requiring an arbitration agreement to be in writing, makes no mention of signature or exchange.

The Singapore International Arbitration Act 1991, whilst adhering to article 7(2) of the Model Law, includes a specific reference to Bills of Lading.

Both the English and Hong Kong Statutes of 1996 provide a very expansive definition of what is an agreement in writing. These definitions, it is considered, will encompass most methods of concluding an arbitration agreement, which may not be covered by article II (2) of the Convention. A common example is when parties conclude a contract on the basis of one party's standard terms and conditions, which include an arbitration clause, which is not signed by one party nor is there any exchange of documents, which could bring the transaction within the definition. Here a contract has clearly been entered into and both statutes recognise that in this situation the writing requirement has been fulfilled.

Similarly, it is sufficient under this definition if the agreement is evidenced in writing. Salvage agreements will also be covered if they are made orally by reference to written terms containing an arbitration agreement.

Section 1031 of the 1998 German Arbitration Law deems compliance with the writing requirement,

"[...] if the arbitration agreement is contained in a document transmitted from one party to the other party or by a third party to both parties and—if no objection was raised in good time—the contents of such document are considered to be part of the contract in accordance with common usage."

The issue then has to be raised as to whether a problem exists when the award has been rendered under a law providing for an expansive definition, but is brought for enforcement to a jurisdiction which does not.

It is to be hoped that enforcing courts will have full regard to the international nature of the arbitration and will respect the fact that the parties have agreed to arbitrate under a law which provides a more expansive definition of "agreement in writing". This conclusion should be more likely if the first time that objection is taken to the written form is when the award is taken to a third country for enforcement. The doctrine of estoppel may also be reverted to.

If the arbitration has been held under the Model Law, non-compliance with the writing requirement of article 7(2) may be cured by submission to the arbitration proceedings i.e. by taking part in the arbitration proceedings without raising this jurisdictional plea as required by article 16(2).

Some commentators have observed that the problems identified with the scope of article II (2) of the Convention do not appear widespread and they have expressed the view that no change is necessary. To this I would counter that there have indeed been cases where a stay of proceedings has been refused because the facts of the case could not be brought within the confines of the article II (2) writing requirement. In other cases, judges have strained their construction in order to fit the facts of individual cases within the definitions.

Furthermore, I would imagine that other cases do not even get to the starting blocks because of the narrowness of the definition.

One reason why the problem may not be so widespread is because more and more judges in various jurisdictions are recognizing the existence of an international arbitration culture and are increasingly taking a more liberal and international approach to the problems thrown up by international commercial arbitration cases coming before them. This is an indication of the enormous influence that both the Convention and the Model Law have had over the last few years. Furthermore, the provisions of article VII of the Convention are attracting more attention these days.

As Pieter Sanders said this morning, the future lies to a great extent in harmonization. Later in these proceedings others will be discussing the possibility of an additional or parallel convention. If this proposal gains support, I hope and expect that article II (2) will be high on the agenda for inclusion.

Third parties and the arbitration agreement

JEAN-LOUIS DELVOLVE

Attorney, Paris

"Even the most beautiful girl can only give what she's got ..."

In the same way, whatever the virtues of an arbitration agreement and however highly it might be regarded, especially in international arbitration, it will sometimes be rejected out of a feeling that it cannot deliver justice that is as certain, impartial or effective as that provided by a State's courts of law. Some people, or even States, reject arbitration altogether and would not under any circumstances allow themselves to be judged by arbitrators.

This rejection of arbitration is quite legitimate. It derives from the "right to a judge", i.e. the fundamental right of the parties to enjoy the guarantees of a fair trial that State justice is supposed to provide. This is the intention, for example, of article 14(1) of the United Nations International Covenant on Civil and Political Rights, and of article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Which is why no one may be forced to arbitration against his will.

The requirement of an agreement in writing, as stipulated in article II of the New York Convention, implicitly gives effect to this principle. If there is no written agreement between the parties, an arbitral award cannot be subject to the rules of the New York Convention.

But documents do not stay in one place. The arbitration clause—the agreement on submission to arbitration—is a contractual document. It can be transferred to third parties, generally in connection with the transfer of the principal contract or as a consequence of such transfer. One can but cite some examples: universal transfer of assets (successions, mergers, demergers and acquisitions of companies) or specific transfer of assets (transfer of contract or assignment of receivables or debts, novation, subrogation, stipulation in favour of a third party); or, in the case of multiple parties, or groups of contracts or groups of companies, implicit extension of the application of the arbitration agreement to persons who were not expressly parties thereto. Thus, third parties may suddenly find themselves involved in an arbitration agreement, or even an arbitration proceeding which is already under way.

The situation can then arise where there are two competing claims: that of the third party, who may no longer be a third party, claiming his "right to a judge"; and that of the other party, claiming his "right to an arbitrator" on the strength of the arbitration agreement which he invokes, a right to an arbitrator which he bases on the principle of freedom of contract, itself derived from the principle of freedom of trade and commerce.

The New York Convention does not resolve this conflict and was not intended to do so.

However, the Convention has another intention. This is indirectly to set forth, in article V, essential safeguards which will assure alleged third parties that the arbitral justice which they appear to dread offers as much protection of their rights as the State justice which they invoke. Indeed—and this is reflected in the UNCITRAL Model Law as well as modern arbitration law (for example, French, Dutch, Swiss, English, German or Italian law)—it provides for the enforcement of an award to be refused where either:

- (a) the freedom of a party not to be forced to arbitration against his will has not been respected by the arbitrators (article V(1)(a) indicates that the arbitration agreement is not valid in respect of that party in the absence of his consent) or
- (b) the equality of the parties in the arbitration proceeding has been infringed (article V(1)(d)).

Thus, the New York Convention has the immense merit of demonstrating that arbitral justice offers the parties advantages and safeguards that are no less than those offered by ordinary justice.

Consequently, the State courts responsible for verifying the validity of awards at the time of their pronouncement or enforcement should not base their decision on a mere point of dogma whereby the award has to be overturned simply on the ground that the supposed third party was not a party to the relevant written agreement from the outset. They should rather seek to establish whether, in accordance with the traditional contract law applicable to the transfer of the arbitration clause or agreement, the arbitration agreement is transferable under the applicable law and whether the transfer has actually occurred pursuant to that law, in the full knowledge that such transfer has no prejudicial effect, in terms of the justice to be delivered, on the right of any of the parties to be fairly judged.

Moreover, excessive formalism could harm the true interests of the parties inasmuch as arbitral justice is sometimes better equipped than ordinary justice to state what is true and fair in matters of international trade.

Provisional and conservatory measures

V. V. VEEDER
Attorney, London

The problem is old. An arbitrator is not a State judge, superman or wonder-woman; and an arbitration award is not self-executing like the order of a State court. An award is enforceable at law by a State court by reference to its national law or as a foreign award under the New York Convention. Such awards are blessed; but for too long, there have been difficulties enforcing an arbitrator's order for interim measures, both abroad and domestically.

An order for interim measures is essentially temporary in nature; it is not an award which is always final; but an interim order can be at least as, or even more important than, an award. In the absence of an enforceable interim measure, it is sometimes possible for a recalcitrant party to thwart the arbitration procedure—completely and finally. An enforceable interim measure can maintain the *status quo* until the award is made and it can also secure assets out of which an award may be satisfied where a recalcitrant debtor is deliberately dissipating assets to render itself eventually judgment-proof.

Patchwork reforms to national laws have resolved many obstacles blocking the enforcement of a domestic order for interim measures; and that is not the subject of my remarks. I am concerned now with the remaining difficulties for enforcing an order for interim measures abroad, outside the seat of the arbitration. These difficulties have grown with the success of international commercial arbitration. The arbitral seat is now more often a neutral place with no legal or financial links to the parties and court enforcement at the arbitral seat of an interim order can be an empty remedy. And where the legal remedy is empty, there are signs that arbitrators are reluctant to order interim measures at all.

This absence of any international legal order for enforcing abroad an arbitration tribunal's provisional and conservatory measures now strikes at the heart of an effective system of justice in transnational trade. This problem was not addressed in the League of Nations' Protocol on Arbitration Clauses (Geneva, 1923) and Convention for the Execution of Foreign Arbitral Awards (Geneva, 1927); and of course it could not be resolved under articles 9 and 17 of the UNCITRAL Model Law. The only relevant instrument is the New York Convention; but we know now that it provides no or no safe solution to the problem. The better view of its application excludes any provisional order for interim measures from enforcement abroad as a Convention award, however urgent or necessary to safeguard the arbitral process. The decision to that effect of the Australian Court in *Resort Condominiums International* (1993)¹ is persuasive; and commentators who criticize the judgment have never done so with equal persuasiveness, still less when they cite domestic cases; and Professor van den Berg says only this in his forthcoming second edition: "It is arguable that an award for interim relief can be enforced under the New York Convention." Can arguments suffice? In a matter of such importance, I suggest not. The preferred solution lies in a supplementary convention to the New York Convention on the enforcement by State courts of an arbitral tribunal's interim measures of protection.

There are four aspects to this solution.

First, the international system of commercial arbitration plainly requires the assistance of State courts for the enforcement of an arbitral order for interim measures. Like an award, such an order is not self-executing; and arbitrators lack the sanctions of State courts for the enforcement of their orders.

Secondly, the choice of a neutral seat for the arbitration means in practice that the courts of that seat may have no effective jurisdiction over the party against whom interim measures are to be enforced. This proposed solution necessarily involves a State court enforcing a foreign award made outside the territory of that State.

Third, even where a foreign court will now render assistance to an arbitration elsewhere, it does so by way of an *original* jurisdiction and not by *enforcing* the arbitration tribunal's interim order. That approach is not wrong in itself; but inevitably it invites the foreign court to review the merits of the parties' dispute. Where those merits have been reviewed by the arbitration tribunal and an order for interim measures made, the foreign court's primary task should be to enforce the interim order and not to perform the same task twice, with the risk of delay and expense. And of course, there are still countries where courts lack any jurisdiction or powers to assist a foreign arbitration or where any court application for interim measures is treated as a breach of the parties' arbitration agreement.

Lastly, the widespread use and ever-increasing popularity of commercial arbitration requires an international solution. International commercial arbitration is here falling behind international litigation. In 1996, the International Law Association (ILA) published at its Helsinki meeting its resolution on Provisional and Protective Measures in International Litigation which is currently being considered at the Hague Conference. More immediately, the European Court of Justice may soon declare new powers for State courts in its forthcoming judgment in *The Van Uden Case*,² a reference from the Dutch Hoge Raad. If the recent opinion of its Advocate-General Philippe Leger is followed by the Court, article 24 of the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (Brussels, 1968/1978) could there be interpreted to allow an aggrieved party to by-pass its arbitration agreement (and the Convention) and to seek enforcement of court-ordered interim measures within the European Union. If so, that judicial approach will have been provoked by the perceived weaknesses in the Convention.

For the transnational trader everywhere the present position is unsatisfactory. If an award can be enforced under the Convention, then why not an interim order made by the same arbitral tribunal for the sole purpose of ensuring that its award is not ultimately rendered nugatory by the other party? It defies logic and practical common-sense.

If the international will were there, the drafting of a supplementary convention could follow with relative ease. Enforcement would be subject to a court's discretion broader than article V of the Convention; it would include the court's power to enforce the order in different terms; and an application for enforcement could be made subject to the prior leave of the arbitral tribunal making the interim order, with reasons to be given for both interim order and leave. It might also be necessary to exclude an interim order for payment to the creditor from the list of qualifying interim measures, as does the ILA's Helsinki resolution. These are details subsidiary to the overall solution. Whatever further qualifications could be required for court enforcement for a foreign order for interim measures, it could only improve the present position.

Seventy-five years after the Geneva Protocol and 40 years after the Convention, it is not now too soon to find and implement a simple, effective and practical solution which is needed by international trade. And like Oliver Twist holding out his empty bowl of porridge we ask only: Please Sir, may we have another United Nations convention?

Court assistance with interim measures

SERGEI N. LEBEDEV

President, Maritime Arbitration Commission; Professor, Moscow

In the context of one of the most important questions of international trade law, namely the settlement of disputes arising in contractual relations, the twentieth century has been marked by universal recognition of the institution of arbitration as a mechanism of private justice established by the contracting parties themselves, where they normally belong to different States. Judging by the well-documented experience amassed in the area of international commercial contracts of widely varying types, it may be expected that arbitration, which is progressively evolving both in terms of practical application and in terms of normative regulation, will maintain its leading position among the alternative (extrajudicial) means of dispute settlement in the twenty-first century.

From the normative point of view, together with the development of national legislation, an important role is played by international harmonization efforts and the advances made in that direction, including in particular one of the most "felicitous" (from the point of view of universal adoption) private-law conventions, namely the New York Convention, and the UNCITRAL Model Law, which has been, and is continuing to be, adopted by an ever greater number of countries as codifying legislation within their own domestic law.

The prospects for the development and simplification of international commercial arbitration regulations in the light of practical needs depend on how new problems are tackled *de lege ferenda*, one such problem, in my opinion, possibly being mutual assistance between courts and arbitrators with regard to interim measures of protection in aid of claims which, by consent of the parties, are to be settled in arbitration proceedings. It is very often the case that the hearing of a dispute is set to take place in one country, whereas enforcement of the award, if it is not executed voluntarily, is to take place in a different country, where the debtor's property may be located. In such a situation, to what degree is it possible to implement measures of protection in aid of the claim pending pronouncement of the arbitral award (e.g. through the securing of a bank guarantee)?

It is worth recalling that substantial and detailed work was carried out with success on a comparative basis under the auspices of the Committee on International Civil and Commercial Litigation of the International Law Association which, at its 67th Conference in Helsinki in August 1996, adopted a set of Principles on Provisional and Protective Measures in International Litigation. The Conference decided to send that document to UNCITRAL and to the Hague Conference on Private

International Law "for consideration". It can be assumed that the experience of the ILA may be of value in tackling the corresponding questions related to the procedures for implementing interim measures of protection in aid of claims to be settled in arbitral proceedings, which give rise to special issues and problems of their own compared with judicial proceedings, the problems involved being even more urgent in nature.

Arbitrators do not possess powers of the same quality as those enjoyed by judges, and their possibilities are limited. The provisions of arbitration rules (such as article 26 of the UNCITRAL Rules and similar provisions from a number of institutional arbitral tribunals) and even of laws (such as article 17 of the Model Law) concern possible dispositions in relation to the "subject-matter of the dispute" only, rather than protection of the claim *stricto sensu*. The functions of arbitrators do not cover third parties, such as banks, where the assets of one of the parties may be held. The question of interim measures of protection in aid of a claim may arise before the arbitral tribunal has been established, whereas an urgent response to the question may be necessary before, for instance, the financial assets are spirited away into a "black hole".

The legislation of a number of countries includes provisions on judicial measures of protection in aid of claims to be considered in arbitral proceedings designated to take place in the country of jurisdiction of the court (*saisie conservatoire*, attachment, injunction, arrest, etc.). However, comparative analysis of the provisions reveals substantial differences in the way these interim measures of protection are implemented. Only in a very few countries are the functions of a court of justice deemed to also cover cases where arbitration is to take place in a foreign State. In a number of countries, however, there is no possibility whatsoever of applying to a court for measures of protection in aid of a claim if, by agreement of the parties, such claim is to be considered in arbitral proceedings, even in cases where the arbitration proceedings have already begun.

Research within the framework of UNCITRAL on issues relating to measures of protection in aid of claims to be settled in arbitral proceedings could lead to the development of new normative solutions, possibly in the form of additions to the Convention or the adoption of a new convention on the subject, or else in the form of an addition to the Model Law, or in some other form.

Awards set aside at the place of arbitration

JAN PAULSSON

Attorney, Paris

Vice President, London Court of International Arbitration

Broadly speaking, the New York Convention was intended to make it easier to enforce an arbitral award rendered in one country in the courts of other countries. Therefore, the Convention focuses squarely on imposing certain obligations on the judge at the place of enforcement. It does not create obligations for the courts at the place of arbitration—that would have been beyond the scope of the Convention. So each country remains free to make whatever rules it wishes with respect to the grounds on which they might invalidate an award rendered in their territory.

This creates a problem, in an indirect way, in the application of the Convention, because article V(1)(e) makes it possible for courts to refuse to recognize or enforce foreign awards if they have been set aside by the courts in the country where they were rendered. As has been recognized for many years, this exposes a potential weakness in the Convention system, by making the reliability of an award subject to local peculiarities of the country where the award was rendered—including eccentricities, or whims, or even xenophobia.

This poses an obvious danger to the harmonization of the legal regime of international transactions.

One can imagine a situation where the courts of the place of arbitration apply criteria for the annulment of awards which are clearly contrary to the contemporary international consensus, such as allowing review of the merits of awards or invalidating awards for failure to abide by pointless formalities, which neither party had raised during the arbitration. That is bad enough. But one can also imagine criteria which would be internationally intolerable, such as invalidating awards because all the arbitrators were not of a certain religion, or were not of the male gender.

Under what circumstances should an enforcement judge operating under the Convention disregard the annulment of an award by a foreign court, and enforce the award notwithstanding that annulment?

Three different solutions have been advanced.

The first solution is to ignore article V(1)(e) entirely, on the basis that the Convention allows each country under article VII to adopt a more liberal regime in favour of enforcement. This solution would therefore entirely displace the control function of the enforcement jurisdiction or jurisdictions. If an award meets the criteria of the enforcement jurisdiction, the judge there simply would not be required, nor indeed entitled, to give any weight to what a foreign court may have done to an award; that would be a matter of purely local consequence in that country.

Whatever else one might say about that solution—although I could live with it and so it seems, from his remarks today, could Robert Briner—it appears in the light of international practice in 1998 to be too radical, and contrary to current expectations of both lawyers and indeed users.

A second solution starts with the postulate that the problem stems from the fact that some countries are out of the mainstream, and cannot be relied upon to apply international standards. But most important trading countries abide by the contemporary international consensus. Therefore there is no reason—so say the proponents of this solution—why there could not be a mini Brussels Convention (Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, Brussels, 1968/1978) or a mini Lugano Convention (Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Lugano, 16 September 1988) relating solely and specifically to court decisions dealing with arbitration, so that each country within this group of mutually trusting countries would give *res judicata* effect to each others' judgments and thus create significant harmonization.

Whatever else one might say about this proposal, and disregarding the unappealing spectre of creating clubs of "trustworthy" countries, it would seem unfortunate

to bring the international arbitral process, which by its essence contemplates minimal court intervention, back into a regime which focuses on the role of the courts.

I favour a third solution, which goes back to article V and proceeds on the basis that it is discretionary—courts *may* refuse enforcement (and therefore may also accept it) when an award has been annulled in the place where it was rendered. How should this discretion be exercised?

The enforcement judge should determine whether the basis of the annulment by the judge in the place of arbitration was consonant with international standards. If so, it is an International Standard Annulment, and the award should *not* be enforced. If the basis of the annulment was one not recognized in international practice, or if it was based on an intolerable criterion, the judge is faced with a Local Standard Annulment. He should disregard it and enforce the award.

One may expect that such an approach would lessen the temptation to issue Local Standard Annulments. It is also to be noted that this solution is entirely consistent with the 1961 Geneva Convention (about which we heard earlier from Ottoarndt Glossner) and so contributes to harmonization in the right direction.

This third proposal could (and should) become part of any supplement or protocol to the Convention, but one of its attractions is that it does not *require* such a protocol—the solution is already available to individual national systems by virtue of the discretion built into article V.

IV. The bench: judicial application of the Convention

Chaired by Howard Holtzmann

Honorary Chairman of the Board and of the International Arbitration Committee, American Arbitration Association

Two questions were posed to the panel of judges.

Question 1

(a) When a national court is seized of a case concerning the New York Convention, is it useful and appropriate to look at decisions of courts in other countries?

(b) If a national court considers decisions of foreign courts relating to the Convention, what weight should the national court give to foreign decisions? For example, should foreign decisions be used for information or guidance only, or should greater weight be given in the interest of a public policy of promoting harmonization and predictability in order to facilitate international commerce? Are uniform interpretations of such terms as "agreement in writing" desirable? When enforcing awards, should courts apply international public policy rather than national public policy (article V(2))?

JUDGE M. I. M. ABOUL-ENEIN

Constitutional Court, Egypt

Egyptian Courts usually look at decisions of courts in other countries, not only with regard to the Convention. Law books in Egypt usually refer to precedents in other countries in all subjects of law, such as commercial, civil, administrative and even constitutional law.

It is important to note that Egyptian Courts usually consider decisions of foreign courts for information and guidance. The conservative trend dominates the old precedents. However, new trends tend to look to harmonization to facilitate international commerce. Thus, uniform interpretations of terms such as "agreement in writing" definitely are desirable.

With regard to the application of the Convention, the Court of Cassation, the highest Court in Egypt in commercial matters, has considered the Convention as an integral part of the domestic law of Egypt, and that Convention's provisions stand even if it contradicts the Code of Civil and Commercial Procedures (case no. 547/51, 23 Dec, 1991 and also case no. 2994/57, 16 July, 1990).

The Egyptian Court of Cassation recently applied international public policy rather than national public policy in recognizing and enforcing foreign awards (see decisions in case 88/3, 20 Dec, 1934, compared with decisions issued in 26 April, 1982; see particularly decision in case no. 547/51, 23 Dec, 1991). In 1934, the Court

considered that violation of article 502/3 of the Code of Civil and Commercial Procedures was against national public policy. In 1991 the Court held that the application of the English Law which contradicts the same provision was not a violation of international public policy. However, some conservative attitudes dominate in other countries of the region in this regard.

JUDGE MICHAEL GOLDIE
Court of Appeal of B.C., Canada

Mr. Chairman, I am going to correct you on one matter. It has been many years since I was a solicitor. Before my appointment to the bench I spent my time in the courtroom, including on one occasion a long arbitration under the rules of the International Chamber of Commerce of Paris.

Before I answer the question, to ensure that we are all working on the same basis of information, I should remind you that Canada is a federal State consisting of ten provinces and two territories approaching provincial status. Treaties are not self-executing: the legislative power to enact implementing legislation is determined by the division of powers between the Parliament of Canada and the provinces.

As commercial arbitration and the enforcement of arbitral awards are primarily matters of property and civil rights over which the provinces have jurisdiction, Canada's adherence to the Convention required implementing the legislation first, by each province and the two territories; and second, by the Parliament of Canada in respect of matters falling within the legislative competence of Parliament, namely arbitrations between a private person and a federal department or crown corporation, and arbitrations involving admiralty or maritime matters.

Each of the 13 jurisdictions has implemented the Convention and the UNCITRAL Model Law has been adopted in substance in these same 13 Canadian jurisdictions. As the Chairman mentioned, my province (British Columbia) has incorporated the text of the Model Law into a full provincial statute called "The International Commercial Arbitration Act", containing some differences in language, while maintaining the same structure as the Model Law. From information given to me by Mr. Henry Alvarez, who is preparing material for publication, it would appear that so far the Model Law has been considered in cases in seven of the 13 jurisdictions. I am not aware of any cases in the Yukon territory.

The most active jurisdictions have been Ontario and British Columbia, followed by the Federal Court of Canada, Saskatchewan, Quebec and Alberta. The actual number I have in mind may be inaccurate, but I think the total exceeds 100, which includes two judgments of the Supreme Court of Canada.

Canadian courts have recognized the effect of the Convention and the Model Law. Therefore the short reply to the first question—when a national court is seized of a case concerning the Convention—is that it is useful and appropriate to look at decisions of courts in other countries, and Canadian courts have long recognized that in matters of international law, both public and private, the assistance of courts outside the domestic forum is useful and at times, especially as concerns public international law, is considered to be definitive.

I take by way of example an early and definitive statement made by a member of my court, in a case *Quintette Coal Ltd. v. Nippon Steel Corporation*.³ As you may have gathered from that style of cause, this was a matter involving a coal producer in British Columbia and steel companies in Japan. This is what one of my colleagues, Mr. Justice Gibbs said (I quote):

"We are advised that this is the first case under the British Columbia Act in which a party to an international commercial arbitration seeks to set the award aside. It is important to parties to future such arbitrations and to the integrity of the process itself that the Court express its views on the degree of deference to be accorded to the decision of the arbitrators. [...] It is meet, therefore, as a matter of policy, to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitral awards in British Columbia. That is the standard to be followed in this case."

I should add, as a footnote, that the Canadian judicial system is primarily unitary in the sense that while the provinces provide the facilities, the judges of the superior courts in each province are appointed and paid by the Federal Government. Therefore these courts administer both federal and provincial laws. Apart from small claims courts, there is no provincial system of courts, and apart from the Federal Court of Canada, which has jurisdiction in admiralty, there is no federal system of courts which has a bearing on arbitration between private parties.

The definitive nature of the *Quintette* case is enhanced because leave to appeal to the Supreme Court of Canada was dismissed by the Supreme Court of Canada. This indicates to lawyers and practitioners that that Court did not consider it necessary to review the standard which I referred to just now. Certainly, the policy underlying the Convention and the Model Law, namely the perceived beneficial effect of a dispute resolution mechanism responsive to the wishes of the parties affected, freed of purely local biases and the effect of local law, is fully understood in Canada. Reference was made in the *Quintette* case, at both the trial and appellate levels, to judgments in the Supreme Court of the United States, to two of the circuit courts of appeal of that country, and to a judgment of the New Zealand Court of Appeal.

However, I believe that national courts of law—at least, those in Canada, and I mean primarily the provincial courts of appeal and the Supreme Court of Canada—would stop short of accepting judgments of the foreign courts which interpreted the provisions of the Model Law or of the Convention as *controlling*. At the present time, I would put the case somewhat along the following lines: the decisions of competent courts in other Convention countries will always be considered with respect and will have a strong persuasive influence, particularly in fields where uniformity is highly desirable. In British Columbia, this receives the additional impetus of an unusual preamble to the statute that I mentioned, the International Commercial Arbitration Act, which implements the Model Law. Preambles are no longer fashionable in legislation in Canada, but this one is the exception.

After four "whereas's", we have the following:

"And whereas the United Nations Commission on International Trade Law has adopted the UNCITRAL Model Arbitration Law which reflects (and here I em-

phasize these words) a consensus of views on the conduct of and degree and nature of judicial intervention in international commercial arbitrations [...]"

And that is the emphasis which the legislature has seen fit to communicate to the judges administering this law.

Mr. Chairman, the second question of what weight should be given to foreign decisions, I have endeavoured to answer in the last comments I made.

JUDGE SUPRADIT HUTASINGH

Former Justice, Supreme Court, Thailand

In answer to the first question, when asked to enforce a foreign award, Thai judges, as with judges elsewhere, do not review the merits of the award. We mainly consider whether the essential procedural safeguards, such as the right to be heard and equal treatment of both parties, as set forth in article V of the Convention, have been satisfied. In some exceptional cases, where judicial intervention is required, due respect is given to, and doubt is rarely cast on, the determination and jurisprudence of the arbitrators, whom the parties trust and in whom authority to settle disputes once and for all is vested by the parties.

In making decisions relating to the Convention, Thai courts, of course, will consider foreign decisions on the same matters. However, due to the domestic legal doctrine of sovereignty and the lack of principles of international judicial comity, Thai courts can take account of the decision only as guidance for their determination. This approach may seem to be a partial one. Although foreign decisions do not have effect as such in Thailand, they have long been a very persuasive source for Thai judges. Notwithstanding this approach and the different legal methods and reasoning, however, the results achieved by foreign decisions and their Thai counterparts are not so very different. Moreover, foreign decisions and their judicial reasoning, especially the influential ones, have come into Thai jurisprudence in several less formal ways, such as through meetings and seminars with foreign judges. I think that answers the first question.

JUDGE JON NEWMAN

Circuit Judge and former Chief Judge for the United States Circuit Court of Appeals for the Second Circuit, New York

It is a great privilege to have a brief opportunity to discuss these issues before this distinguished gathering.

The interpretation of documents like the Convention, which are designed to achieve as great a degree of consistency throughout the commercial world as is possible, of necessity must receive a consistent interpretation to the greatest extent possible. National courts such as the one I serve on in this country, I believe, should take very seriously the objective of achieving consistency of interpretation. I do not see the choice as between whether we give controlling weight or merely take guidance. I think a national court will never say that it has surrendered its authority to

the courts of other jurisdictions, unless they are above us in a hierarchical sense. We will always phrase it in terms of taking guidance. The question is, how often will we take that guidance?

It seems to me that generally we should lean in that direction, particularly as concerns those terms of the Convention where there is a strong need to have a common understanding. Obviously, when the Convention says there will not be enforcement if it is contrary to domestic public policy, that is an invitation to the national State to abide by its own public policy. But when the Convention refers to "agreements in writing", and then has some definitional language, the courts should do their utmost to give a consistent interpretation.

Our courts, having been brought up in a federal system, are quite familiar with this problem, as are many other courts in federal systems. We have 50 States which operate under a series of uniform State laws that govern many commercial matters, and those courts are constantly looking at the decisions of other States in order to achieve as much consistency as possible in the meaning of so-called uniform State laws. By the same token, national courts should look at an international convention and give it consistency.

I would make a distinction between two situations. If I have a case where there is an argument as to what a term means, and there are only one or perhaps two decisions of national courts elsewhere, I will have a fair question in my mind whether to follow those decisions, or if I think the interpretation ought to be contrary, to say so. I do not feel that the first court which makes a decision necessarily needs to bind the world. But if there are three, four, five or six jurisdictions around the world that have interpreted the term in a certain way, then even though I may harbour a private view that had I been the first court to decide the question, I would have decided differently, I would feel that a greater public good would be achieved by maintaining the consistency of my jurisdiction with the five or six that have already decided, and by promoting international consistency.

The means to achieve this, however, requires a mechanism. My final point is that while significant efforts have been made in making the decisions of various national tribunals available—they are collected in significant treatises and UNCITRAL puts out case law on UNCITRAL texts periodically—the system is not nearly as efficient and up to date as it could be. I would therefore urge all who are involved in this effort towards standardization to search for ways of making it possible to have the decisions of national tribunals construing these treaties made available on a very periodic basis, no less frequently than monthly, furnished to a central authority, translated, and put on line. The efforts of a law school could perhaps be useful in making this possible. This exercise would serve two purposes. It would make it possible for the practitioners who appear before us to readily consult current decisions of foreign tribunals and cite them to us. It would also provide an incentive to us, as decision makers, to make our decisions available to that central authority within a day of the time the decisions are rendered, so that the decisions may be broadly available to the world commercial community.

I know that efforts are being made to do this, but I feel that greater efforts are necessary in order to make this a highly organized, highly efficient, electronically accessible system so that the output of national tribunals can be cited by the bar and inspected by the tribunals towards the end that consistency will be enhanced throughout the world.

JUDGE ANA PIAGGI DE VANOSI

Commercial Court, Argentina

With regard to interpretation, it is a principle in my country to strive to harmonize the decisions of local courts on issues connected with the Convention, or any other treaty in force, with foreign decisions handed down on similar issues. In particular, foreign judicial decisions or arbitral awards are benchmarks or guidelines in the domestic sphere, with the aim of optimizing harmonization and predictability of legal solutions.

Where there are different possible interpretations or understandings of an internal rule related to an international treaty, we choose that which preserves the fulfilment of obligations assumed. The rule of interpreting undertakings of the State as being binding in character takes priority in the Argentine legal order. And, if the legislator enacts a law containing provisions contrary to a treaty, or renders its observance impossible, this involves a transgression of the principle of the hierarchy of rules and would be constitutionally invalid.

At this stage, it seems appropriate to spell out the consequences of this position from the standpoint of the constitutional validity of the delegation of powers, since it is a principle implicit in the Argentine legal order that delegated powers are to be exercised in compliance with international agreements in force. From another perspective, the role of Congress in the complex federal procedures that culminate in the approval and ratification of a treaty always implies the existence of a political directive that becomes embodied in every act of delegation and in the exercise of the power delegated. The interpretative rule is *favor tractatus*.

Thus, the solution to the problem of the relationship between municipal law and international treaties falls to the constitutional organization of the country, constituting a directive implicit in the internal legal order; to assert otherwise would imply an unconstitutional encroachment of the legislative branch upon prerogatives of the executive, which conducts external relations.

International treaties—in the Argentine legal order—are federal rules approved or rejected by the National Congress through a federal law. The national executive ratifies those approved by law, issuing a federal act of national authority, so that it is irrelevant whether the subject-matter of the treaty pertains to the ordinary law. From that perspective, it is unacceptable to derogate from an international treaty by an act of congress—or by any other internal act of lower rank—because it would violate the distribution of powers laid down by the Constitution.

In this manner, the Vienna Convention on the Law of Treaties (article 27) is respected, as well as customary international law recognized by the case-law of international tribunals. Consequently, the supremacy of treaties over internal law is clear.

This implies recognizing that not only pre-existing national laws that are in complete or in partial contradiction with treaties approved by the Congress and ratified by the Executive are superseded, but indeed the legislative branch is limited inasmuch as it cannot enact laws containing such contradictions.

Naturally, such supremacy gives way to the National Constitution.

As a direct result of this line of thinking, Argentina, as a party to the New York Convention and to the Inter-American Convention on International Commercial Arbitration (Panama, 1975), cannot adopt internal rules which impose conditions more onerous than those arising from those treaties in order to recognize or carry out a foreign arbitral award.

Thus, an award handed down in any of the more than 117 States party to the New York Convention can be assured of expeditious treatment and uniform conditions for its implementation.

In line with the above, some years ago (1995), the National Supreme Court and lower courts established as a general principle the irreversibility of decisions taken by arbitral tribunals within the sphere of their competence.

Question 2:

(a) Do you think that it is desirable to encourage programmes for further familiarizing national judges with issues related to the application and interpretation of the Convention?

(b) If there are programmes to accomplish this in your country, how are they structured? How could they be enhanced?

(c) Would it be useful to encourage such programmes on an international level? If so, would you favour having such programmes conducted by:

- (i) International organizations of judges;
- (ii) The UNCITRAL Secretariat;
- (iii) International organizations for promoting arbitration such as the International Council for Commercial Arbitration (ICCA); and
- (iv) International bar associations?

JUDGE PIAGGI DE VANOSI

With regard to the latter topic to be discussed, although it is desirable and appropriate to encourage programmes that familiarize judges with the application and interpretation of the Convention, in my country they do not exist; to encourage them at the international level seems useful and necessary, and this work could well be done through the UNCITRAL Secretariat, as part of its seminars and briefing missions.

JUDGE HUTASINGH

As far as my country is concerned, English is the second language, and most of our judges are not fluent in English. It is extremely difficult to find a specialist who can give a lecture on the Convention in Thai! In any event, I agree with the idea of training on the application and interpretation of this Convention as part of the work of judges in Thailand, and we do have a training programme in our country.

Although Thailand ratified the Convention in 1959, it became part of domestic law only ten years ago. But since then, arbitration has forged ahead. When Thailand ratified the Convention it did not make any reservations but, unfortunately, in the implementing legislation a requirement of reciprocity was added by the law-maker as a criterion for enforcing foreign awards. However, in practice judges will consider the issue only when the party against whom an award is enforced can prove that the country of origin of the award does not enforce an award rendered in Thailand. In the foreseeable future this problem will be resolved by the new Thai arbitration Bill, which is based on the UNCITRAL Model Law and is currently under consideration by the Cabinet. Under the Bill we treat both domestic and international arbitration equally, following the same standards as the Model Law.

On the second question which I have not answered, to date, Thai courts have not had a real chance to consider the issue of public policy as contained in article V of the Convention. Therefore, in Thailand it has not been settled as to whether public policy should include domestic public policy, or should incorporate only so-called international public policy. In my view, if domestic public policy is to have a say in this context, the scope of its role should be extremely limited in order to facilitate and encourage the use of international commercial arbitration and to harmonize the interpretation of the Convention. I believe that the more coherently the Convention is interpreted and applied by the judiciaries of Member States, the more popular international arbitration will become. Such arbitration users can then be confident, to a certain extent, that the awards they have painfully obtained can be similarly used by courts in Member States.

In order to create such coherence, it will be particularly beneficial to organize a programme for judges from Member States to exchange views and share their experiences on this matter. Such a programme could also become a significant forum in the effort towards harmonizing international trade law as a whole. I hope that UNCITRAL, which is the organizer of this event and has long been successful and active in the field of international commercial arbitration, will soon take the lead role in organizing such a programme.

JUDGE NEWMAN

As far as structure for education of federal judges within the United States is concerned, there exists the federal judicial centre in Washington, which is the education and research arm of the federal judiciary. It runs two types of programmes for judges. One is a programme for when judges first become members of the federal judiciary, either at the first instance or the appellate level, which is typically a one-week session of seminars and educational programmes. Thereafter the centre runs a regional workshop for groups of judges within that region, approximately every three years. I think it would be entirely appropriate to include some exposure and familiarization with the Convention and international commercial matters in general as part of the educational programme that the federal judicial centre brings to judges within their regions.

Whether this should be done as a part of international gatherings is another question: that is a matter of both time and money, both of which are scarce resources. But since the federal judges will in any event be engaged in these periodic workshops, it seems that it would be easier to bring the learning of UNCITRAL to the

judges rather than dispersing American judges all over the world for what could be a comparatively brief matter. But to incorporate this into an educational programme where it might represent one hour of a two-day educational programme seems to me both an easy and useful thing to do.

On the issue of foreign judges participating in such training programmes, I can see that if there is a judge from a foreign court that has heard Convention cases, and cases from other jurisdictions have been cited to that court, where that court has had something of a reputation for paying serious attention, the views of that judge would be very useful to an American judicial audience.

JUDGE ABOUL-ENEIN

In Egypt there are two institutions working on educating and training judges: the Institute of Judges, which is a part of the Ministry of Justice, and the Cairo Centre. The latter has organized 20 international training programmes covering all questions related to international commercial arbitration, theory and practice, including the application of the New York Convention.

These programmes were concluded with the cooperation of leading institutions and organizations such as UNCITRAL, the American Arbitration Association, the London Court of International Arbitration, the International Development Law Institute (IDLI) and others and with the help of experts from all over the world. Many judges participated in these programmes, and they could be enhanced if we were able to obtain more financial resources to cover the travel and accommodation of international experts from all over the world.

In this regard, I would extend special thanks to the UNCITRAL Secretariat, in particular Mr. Herrmann and officers of UNCITRAL who participated in our programmes, and to the American Arbitration Association, which actively participated in these programmes. Special thanks are also due to Mr. Michael Hoellering for his active help and assistance.

JUDGE GOLDIE

I have a footnote to add to Judge Newman's recitation of what a judge needs. In an adversarial system, the courts are very much in the hands of counsel. So the question really is: what help can be given to the judges? So, to the words "familiarization and training", I would add "help".

In answer to the questions, there exist in Canada a number of institutions which in some respects have a parallel with the federal judicial centre to which Judge Newman referred. The first is the National Judicial Institute; the second is the Canadian Institute for the Administration of Justice; and the third, which is somewhat different from the previous two, is the Canadian Institute for Advanced Legal Studies.

The International Bar Association will meet in Vancouver in September, and I was interested to see that there is a day on business law at which there will be discussed environment and trade; experience under NAFTA and the WTO; impact

of the Internet on securities issues and trading; privatization and the aviation industry; and implementation of the Model Law worldwide. Unfortunately, very few Canadian judges belong to the International Bar Association, but it fits the model of educating the Bar so that it can help the judges.

I would leave you with this thought. My impression is that judges have accepted the principles of the Convention and the Model Law. Uniformity of interpretation will take something more than the education of judges and the best help that the Bar can give them. I think that the solution to that has been touched upon. I would urge that UNCITRAL play an active role in promoting to organizations in each Member State which has acceded to the Convention the desirability of programmes which will bring to the attention of the Bar, and of the judges, the importance that can attach to the Convention and Model Law. I say this because I do not think that national judges will easily give up that last mile, to which Judge Newman referred a few minutes ago, without the full assistance of all that can be brought to bear on the question of the importance of the internationalization of trade law.

V. The future: what needs to be done

Chaired by Muchadeyi Masunda

Executive Director, Commercial Arbitration Centre, Harare, Zimbabwe

Improving the implementation: a progress report on the joint UNCITRAL/IBA project

GEROLD HERRMANN

Secretary, UNCITRAL

Following the principle of non-discrimination, I should use the timer also for myself, even if it may mean that finally I have to show myself the red card which has not so far been used. This takes me to a personal note, which is that on behalf of the UNCITRAL Secretariat I would like to wholeheartedly thank all today's chairpersons, and all the speakers, for having accepted our invitation, for having made this event possible and for ensuring that it has been a truly special occasion. I would also like to thank my colleagues in the UNCITRAL Secretariat, and other colleagues of the Office of Legal Affairs who have assisted us in preparing this event.

I have one final personal remark. Looking at my tie, which depicts elephants, someone suspected me of siding with a certain political party in a certain country! I would just like to clarify that this is a Thai tie, in honour of the Deputy Prime Minister, who is with us and who will speak tomorrow night at the dinner of the Commercial Law Association. The elephant is the symbol of enforcement in Thailand: it is a very strong animal, and all the trucks and cars of the enforcement service have the elephant as a symbol. Wearing this tie means showing pro-enforcement bias in a very unbiased and subtle way!

This leads me directly into a discussion of the joint project, which stems from a proposal by Mr. Jan Paulsson six years ago at the UNCITRAL Congress. He proposed monitoring the effectiveness of the implementation of the New York Convention and gave three examples of positive obstacles:

"A number of countries have ratified the Convention without subsequently passing implementing legislation. The effect is that judges simply do not acknowledge the Convention as being binding on them. [One] country recently adopted implementing regulations which erroneously provide that foreign awards will be enforced only if the enforcing country's diplomatic officer, in the place of arbitration, certifies that the party seeking enforcement is a national of a country which is party to the Convention. This is an impermissible addition to the requirements of the Convention. The courts of yet another country require a 10 per cent registration fee for an enforcement action, as though the dispute were going to be heard for the first time on the merits."

Based on the conviction that such impediments result more from unawareness than from obstructionism, Mr. Paulsson suggested that UNCITRAL conduct a survey as to the purely procedural mechanisms which various countries had put into place

to make the New York Convention operative. He concluded that the very existence of such a survey would increase awareness and would hopefully create incentives for individual countries not to be seen as laggards in the hit parade of dutiful implementation of the Convention which, after all, should be viewed as a benchmark of true acceptance of the transnational legal process.

The proposal was accepted by UNCITRAL three years ago at a session of the Commission, and we embarked on a joint venture with Committee D of the International Bar Association. The joint venture was not one of the prototypes with which you are all too familiar, where there are two partners, with one having the money and the other having the knowledge and two years later it is the other way around! On this occasion there were two partners whose project started slowly as both were suffering initially from human resource problems. But today both parties have picked up speed and you can expect a report at the next Commission session in one year's time. And I would like to pay tribute to two particularly active collaborators who are with us today, Judy Friedberg and Sylvia Borelli.

One of the reasons why we have not made more progress to date is something of a shame: not even half of the States to whom we have sent a questionnaire to try and ascertain information on implementation have replied to date. I would urge anyone who has any influence in this area to encourage those States which have not replied to do so as a matter of urgency. This exercise only makes sense if it is as complete and comprehensive as possible.

The primary purpose of the whole project is information: to publish the findings with a view to providing the interested public with the information they need. Once we have that information, we will decide what is the best way in which to present it. Based on those findings, we will determine what else remains to be done. There have been a number of proposals—for example, to prepare a guide for legislators or a model act implementing the Convention. However, at this stage before we have the results, I feel it is too early to consider what to do.

Let me briefly state the objects of our search. We look at the required legislation or other acts (this depends on the individual constitution or tradition of a country) to make it the binding law in a country. Was it published the right way? Which way is the Convention incorporated and made part of national law? Is it referred to, reproduced, paraphrased or translated into a non-official language? Are there any restrictive requirements added to article I which, as we all know, sets out two possible reservations? What is the scope of application—and this is a particularly interesting and possibly troublesome question concerning article II. Since article II itself does not specify its scope of application, to what arbitration agreements does the provision apply?

Are there any additional requirements for referral to arbitration added in implementing legislation (eg. existence of a "dispute")? What are other possibly onerous, interesting points concerning recognition and enforcement? Is the obligation under article III complied with, namely non-discriminatory treatment?

Several points arise here, and I would like to give you some examples and results of replies already received. What about fees? Based on the replies received, in a number of countries there are no fees, which is good and completely non-discriminatory. Where there are fees, they are as a rule independent of the result of enforcement, and in most cases the same fees apply to foreign and domestic awards. In one

country it is cheaper to enforce a foreign award than a domestic one; in three countries it is the reverse.

Which is the competent court? What are the modalities of procedure, either set forth in implementing or other legislation, in a code of civil procedure or other individual law? Is there a time limit for enforcement? Pursuant to replies already received, the majority of States have no time limit at all. But others report a variety of time limits: the majority is more than six years, and this goes up to 30 years; but it can also be as little as six months.

Are there any special rules in the implementing legislation concerning authentications or translations?

I am running out of time, and so I would merely repeat my appeal for all to assist in urging governments to reply, and in verifying and offering further information if you are ever approached by an IBA or UNCITRAL representative.

Enhancing dissemination of information, technical assistance and training

JOSE MARIA ABASCAL ZAMORA
Professor and Attorney, Mexico City

The topic I am about to speak on can be summed up by saying that what has been said in the course of today at this gathering needs to be said outside, repeatedly and in all quarters.

The New York Convention is the most important instrument to have been drawn up in the twentieth century on international commercial arbitration and on uniform international trade law. It could be said that the Convention was the "superhighway" of international contracts. Such importance justifies the need to promote awareness of it and its interpretation, and to continue to increase its application.

During its 40 years of existence, the Convention has generated a wealth of international case law. Mr. van den Berg may correct me, but there appear to have been some 800—or possibly more—judgements which have dealt with the enforcement of foreign arbitral awards involving the application of the Convention by judges in many parts of the world. That case law has been copious and rich in ideas. The Convention has also given rise to extensive, interesting and acknowledged commentaries in widely disseminated books and journals known to all international commercial arbitration experts.

These publications are in all cases aimed at specialists in arbitration, people such as ourselves, who are gathered here, and who are involved in and conversant with the subject. The problem is that this literature is essentially produced in English and is thus accessible only to those who understand, read, translate and use that language. But the people for whom the Convention is actually intended are practising lawyers

engaged in arranging contracts and advising clients about their contracts, lawyers handling disputes at law between parties, and judges needing to apply the Convention whenever a party fails to comply with an arbitration agreement or an arbitral award has to be enforced. The vast majority of lawyers in the English-speaking world and elsewhere are not arbitration specialists and, although there are no statistics, I will venture to say that, outside circles such as this, there is little knowledge of the importance, interpretation and application of the Convention, and still less in areas where English is not spoken and used.

It is therefore most important that these major developments in international commercial arbitration, which are bound to continue, should reach the vast majority of lawyers and judges who are required to deal with the Convention. The mistrust of all judges and lawyers worldwide of anything foreign is well known, and international conventions have always been perceived by local courts as something strange, created abroad and used by sophisticated lawyers serving the foreigner's interests, regardless of the place and country concerned. It is only through information and greater knowledge that these barriers can be overcome. Consideration should therefore be given to adopting measures that will help to disseminate information on, and increase awareness and acceptance of this instrument, which has proved to be useful to mankind and is destined to bring it still many more benefits.

In my view, UNCITRAL is the main body that can assist in this endeavour. As to what proposals may be put forward, the first one I would make is that UNCITRAL initiate a project for the codification of all doctrinal and case law information in existence on the Convention. When I say codification, I mean the compilation of a sort of legal guide to the Convention that would be available worldwide, bear the hallmark of UNCITRAL and that of the United Nations, be produced by the United Nations, with the participation of all States, and be translated into its six official languages, so that, for example, a Mexican lawyer is not faced with the difficult task of submitting to a judge in his own country the English text of a ruling or opinion adopted in another country, which would cause him, as the attorney of one of the parties, to be viewed with mistrust, thus creating a barrier. That would be my first proposal.

A second proposal might be for an association of judges to be organized in a similar way to INSOL International (International Federation of Insolvency Professionals), an international federation which brings together judges specializing in the insolvency sphere from across the world. Thought could also be given in this connection to the idea of judges from the different parts of the globe meeting together to discuss issues relating to the uniform and flexible application of the Convention.

The judicial system enjoys its independence, which is quite right. Judicial systems should be independent and judges themselves should determine how they apply the Convention. They will do so with independence only if they agree among themselves. As Mr. Herrmann mentioned a short while ago, they do not like to be advised or instructed. They have a sound attitude to the notion of being independent.

In addition to the codification proposal to which I have already referred, UNCITRAL might request its Secretariat to have an annual report prepared for the Commission, providing a survey on developments in the application and interpretation of the Convention during the year. Finally, I would mention the idea of having the Convention regularly included, as a priority topic, on the agenda of all possible seminars and symposiums and in all ongoing law school curricula.

Striving for uniform interpretation

ALBERT JAN VAN DEN BERG

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In 1958, everyone was happy with the result of the endeavours for the new international convention on international commercial arbitration. At that time it was believed that the text and structure ensured uniformity.

Some 20 years later, the New York Convention's principal architect, Pieter Sanders, got the brilliant idea to collect and publish court decisions on the Convention in the *Yearbook of Commercial Arbitration*. I then attempted to make the judicial developments more accessible in a book that came out in 1981. That reality looked encouraging. The "pro-enforcement" bias of the courts was clearly breaking through.

Now in 1998, 40 years later, we cherish the achievements. The Convention is widely acclaimed as being an incredible success. I would like to use this occasion to express my gratitude for this to one group of persons in particular: the judges in most countries around the world who have supported the Convention so strongly. Without them, we would not be celebrating here the most successful international convention in international private law of this century.

The question thus becomes: What could or should we do 40 years later for the next 40 years to come? Here, it is useful to make a distinction between interpretation and application of the Convention by the courts, on the one hand; and perceived shortcomings in the text and structure of the Convention on the other hand.

With respect to the first point, there is no cause for complaint. As I just mentioned and as it is generally acknowledged, most courts, as a rule, are doing very well in properly interpreting and applying the Convention.

This is not to say that no attention needs to be paid to them anymore. To the contrary, in order to maintain the present level of success, it is important to continue to monitor court decisions on a global level. It should not be forgotten that the success of judicial unification of interpretation is in particular the result of the comparative case law method. Furthermore, it is highly desirable that information on the Convention's functioning be provided to judges and practitioners in new Contracting States in a practical and digestible manner.

As regards the second point, when one hears concerns voiced about the Convention, they relate to matters that are desired to be included in, or excluded from, the text of the Convention. Summarizing today's "wish list", the following seven matters are mentioned in particular:

- (a) The absence of a global field of application of the Convention, in the sense that, in principle, it does not apply to the enforcement of awards in the country of origin;
- (b) The written form requirement of the arbitration agreement, which is considered to be too stringent;
- (c) The possibility of enforcement of interim measures;
- (d) Discretionary power to enforce an award notwithstanding the presence of a ground for refusal of enforcement;

- (e) Waiver of a ground for refusal of enforcement;
- (f) The annulment of the award in the country of origin; and
- (g) Procedure for enforcement of a Convention award.

The last point, concerning the procedure for enforcement of a Convention award, can be solved by a possible Model Law on implementing the New York Convention. This may be one of the results of the joint IBA/UNCITRAL project about which Gerold Herrmann spoke earlier. Such a Model Law is desirable, not least because the existing implementing laws are widely diverging, and the procedure for enforcement of foreign awards under the Convention needs to be harmonized. It is unacceptable that at present it depends on the country where enforcement of a Convention award is sought whether there are one, two or even three courts that may adjudicate on a request for enforcement of a Convention award. It is equally unacceptable that the limitation period for enforcement depends on the country where enforcement of a Convention award is sought. For example, China allows 6 months after the award—the Netherlands 20 years.

Most of the other six points on the "wish list", in my opinion, can be resolved by an appropriate judicial interpretation. However, some commentators disagree and have suggested amending the Convention in the form of a protocol or even a new convention.

I submit that such an action will not be understood by many Contracting States. They believe that the Convention is very helpful and simple. Why change it? To do so may undermine the credibility of the Convention. And honestly: Are the items on the "wish list" really so compelling that they justify the trouble of adopting a new international treaty? To quote an old American adage (since we are in New York): "If it ain't broke, don't fix it."

Instead, I believe that the solution for most items on the "wish list" is to be sought in a different direction. This solution is offered by the more favourable provision of article VII(1) of the Convention.

That provision has for a long time been ignored by the courts, practitioners and commentators alike. They have recently "discovered" it.

As you know, the more favourable provision of article VII(1) allows a party seeking enforcement to rely—not on the Convention itself—but rather on the law or treaties concerning enforcement of foreign awards in the country where enforcement is sought. Thus, if the Convention would not allow enforcement, a party may still be able to obtain leave for enforcement on the basis of a more favourable domestic law concerning enforcement of foreign arbitral awards.

The solution I suggest is to draft a model law for the enforcement of foreign arbitral awards outside the Convention pursuant to its article VII(1).

This suggestion may be surprising for you. There is already an UNCITRAL Model Law on International Commercial Arbitration. That Model Law indeed nicely complements the Convention in such a manner that the Model Law and the Convention provide together a solid legal basis for international commercial arbitration.

It is worth noting that, when the Model Law was being drafted in the early 1980's, the drafters did not go outside the four corners of the Convention. The result

is that the provisions relating to the enforcement of foreign arbitral awards in the Model Law are almost a carbon copy of the Convention. The provisions relating to the required written form of the arbitration agreement have been somewhat elaborated, but here again the basic structure has not been changed. Simply put, at that time, the need for change was not felt.

This may be different today. If that is so, it is easier to draft a model law on the enforcement of foreign arbitral awards outside the Convention, than to amend the existing Convention. It is also noteworthy that not many countries have a statutory regulation for the enforcement of foreign arbitral awards as contemplated by article VII(1) of the Convention. I consider this a lost opportunity since article VII(1) is clearly an open offer to Contracting States.

One of the few countries which used the opportunity offered by article VII(1) of the Convention is the Netherlands. Article 1076 of the Netherlands Arbitration Act, 1986 contains provisions for the enforcement of foreign arbitral awards outside the Convention. It is more liberal than the Convention. To give an example: the form of the arbitration agreement only needs to be valid under the applicable national law. Furthermore, if a party has failed to raise the plea in the arbitration that a valid arbitration agreement is lacking, it has waived the right to invoke it in the enforcement proceedings under article 1076 of the Netherlands Arbitration Act.

One must also add France to the list. Obviously, France has equally used the opportunity under article VII(1) of the Convention, as otherwise we would not have been able to enjoy the juicy tales of *Hilmarton*.⁴

But if one looks to other recent arbitration acts, it is surprising to see that they do not contain provisions on the enforcement of foreign arbitral awards outside the Convention. The Swiss International Private Law Statute, 1987 limits enforcement of foreign awards to the Convention. The German Arbitration Act, 1998 has abandoned the liberal regime of the previous article 1044 Zivilprozessordnung (ZPO).

A country may have a legal regime concerning the enforcement of foreign awards outside the Convention that is developed by case law. This may lead to misunderstandings in relation to article VII(1) of the Convention, as has been seen in the United States. The doctrine is well established in a series of cases, including notably *Gilbert v. Burnstine*.⁵ The relationship with article VII(1), however, was hopelessly misunderstood by the District Court of Columbia in the *Chromalloy* case.⁶

The statutory provisions on the enforcement of foreign awards being divergent or non-existent in many countries, it would be preferable if an internationally recommended text of statutory provisions for enforcement of foreign awards outside the Convention were available.

Such a Model Law on the enforcement of foreign awards could have the form of a stand alone text or a possible modification of the Model Law.

The advantages of the form of a model law on enforcement that I have suggested are manifold:

- (a) It avoids the drafting and acceptance of a new international treaty;
- (b) The Convention remains a world wide recognized cornerstone of international commercial arbitration; and

- (c) Whilst uniformity is very much desired, a State can still deviate from the suggested text. This may facilitate the adoption of such a model law.

In conclusion, my recommendations are:

- (a) Don't touch the venerable Convention;
- (b) Continue to monitor the court decisions on the Convention;
- (c) Continue to educate judges and practitioners on the Convention;
- (d) Draft a Model Law on implementing the Convention with respect to the procedure for enforcement of convention awards;
- (e) Draft a Model Law on the enforcement of foreign awards outside the Convention as contemplated by article VII(1) of the Convention.

I respectfully submit that with these measures the Convention will remain a success during the next 40 years.

Considering the advisability of preparing an additional Convention, complementary to the New York Convention

WERNER MELIS

Chairman, Presiding Council

International Arbitration Court, Austrian Economic Chamber

The New York Convention reflects the realities of international arbitration of the 1950s. It is still a surprisingly modern instrument. I fully join the previous speakers who have expressed the opinion that the Convention should not be amended. It is still up-to-date and is applied world-wide. An amendment would do nothing more than create confusion.

However, the world of international arbitration has changed since the creation of the Convention. I should think that it would be useful to envisage, therefore, an additional convention complementary to the Convention which would deal with issues which have arisen in the practice of international arbitration during the last 40 years.

The following issues, *inter alia*, deserve consideration.

The means of communication have drastically changed in the last 40 years. The definition of "agreement in writing" in article II (1) of the Convention was already out of fashion a few years later, as reflected in article I(2)(a) of the European Convention on International Commercial Arbitration (Geneva, 1961). However, article 7 of the UNCITRAL Model Law contains a definition which is still up-to-date and satisfactory. Therefore, it would be advisable to provide in the new convention a definition of "agreement in writing" on the basis of an extensive interpretation of the definition in the Model Law and in any case make it clear that the term "in writing" covers all means of communication which can be evidenced by text, as in article 178 of the Swiss Private International Law, 1987.

Secondly, the Convention deals only with the recognition and enforcement of *awards*, that is, final and binding decisions. This definition does not cover, for instance, settlement agreements, although many arbitral proceedings are terminated by settlements. In order to overcome this difficulty, some arbitration rules of arbitration centres, like article 20 of the Rules of Arbitration and Conciliation of the International Arbitration Centre of the Austrian Federal Economic Chamber (Vienna Rules), provide that the parties can require that an award be issued concerning the content of any settlement reached between them. The new convention could contain a similar provision or simply provide that settlements fall into the same category as awards.

Also, a series of international arbitral centres have provisions in their institutional rules similar to article 26 of the UNCITRAL Arbitration Rules, which gives arbitrators the right to order interim measures of protection. The problem is that only very few jurisdictions will enforce such interim measures ordered by a tribunal within the limits of their jurisdiction. This means that, even in these countries, interim measures ordered against parties having their place of business outside their jurisdiction would not be enforced by a State court.

I follow Mr. Veeder's view that the new convention should contain a provision that the courts of the contracting parties would enforce interim measures ordered by a tribunal sitting in the territory of a contracting party.

As Mr. Paulsson has correctly pointed out, the Convention deals exclusively with the enforcement of foreign arbitral awards and not with the grounds for the setting aside of an award in the country where it had been made. This has sometimes led to surprising annulments. It would be desirable, therefore, to give judges the power to disregard minor violations of procedure which have no bearing on the award in enforcement proceedings. Also here, the Model Law offers a good solution in article 34, which lists and therefore limits the grounds for the setting aside of an award.

As long as the above-mentioned problem continues to exist, namely that arbitral awards are set aside in the country where they have been made on merely local grounds which are inconsistent with internationally recognized legal reference standards, the question arises whether such awards which have been set aside will be enforced in third countries. There are now a few cases where courts have enforced arbitral awards which have been annulled by a court in the country where they have been made.

Here again, it would be useful to have in the new convention a provision which gives the courts the right to enforce arbitral awards that have been annulled in another country under specific conditions, such as is contained in article IX of the European Convention on International Commercial Arbitration.

As an administrator of international arbitrations, I am always surprised to see how many arbitration clauses are pathological, to an extent that there is a great risk that a court might consider them invalid. In my experience, almost 50 per cent of the clauses submitted before our Centre are to a certain degree defective. As it is probably an impossible task to persuade the parties to write clean arbitration clauses, the new convention should contain solutions which remedy this problem.

Here, again the European Convention on International Commercial Arbitration contains a useful provision. Article V, for instance, provides that a party which

intends to raise a plea as to an arbitrator's jurisdiction shall do so not later than the delivery of its statement of claim or defence relating to the substance of the dispute. A provision similar to this would be useful for the new convention.

Additionally, article IV of the European Convention on International Commercial Arbitration contains useful provisions to remedy defective arbitration clauses. It is possible for a party wishing to begin arbitral proceedings to make their application to the President of the Competent Chamber of Commerce or a Special Committee to "establish directly or by reference to the rules and statutes of a permanent arbitral institution the rules of procedure to be followed by the arbitrator(s) [...]" (article IV(4)(d)).

The President of the Competent Chamber of Commerce or a Special Committee may determine an arbitral institution when the parties have agreed to submit their disputes to a permanent arbitral institution without pre-determining the institution (article IV(5)), or to refer the parties, when the parties have not specified the mode of arbitration in their arbitration agreement (institutional or *ad hoc*), to a permanent arbitral institution or to request the parties to appoint their arbitrators.

The President of the Austrian Federal Economic Chamber, in his capacity of President of the Competent Chamber of Commerce, has received in Vienna a series of applications under this article and has been able to remedy pathological clauses under article IV.

The European Convention on International Commercial Arbitration has a typical East/West arbitration background. I think, however, that it would be very useful to have similar provisions adapted for world-wide use in the new convention.

In the course of preparing and drafting a new complementary convention to the New York Convention, additional issues may present themselves. Of course, the new convention should be flexible enough to adopt those changes as needed. The most important thing to keep in mind, however, is that the work should begin as quickly as possible at UNCITRAL.

Possible issues for an annex to the UNCITRAL Model Law

GAVAN GRIFFITH

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Those of us who signed off the text of the Model Law adopted at Vienna on 21 June 1985 appreciated that it was premised upon the principles of party and of State autonomy. We accepted the capacity of the parties otherwise to agree. And, as a model law, each enacting State was to be free to adapt and modify its terms. Further, the Model Law was never intended to stand as a code. Rather it was to operate within the framework of applicable domestic laws, which we expected would support, and even enhance, the substantive operation of the Model Law.

We knew we had by no means provided for all matters ripe for attention. Our text dealt with the essentials. We were aware that some matters were incompletely provided for. We necessarily had to be somewhat cautious to ensure our law might be acceptable to both civil and common law jurisdictions, with different familiarities with the arbitral process.

In the 13 years since the adoption of the Model Law some States have chosen to enact it verbatim, sometimes augmented by mandatory or optional provisions. Some States have had difficulty in accepting that the interests of commonality of approach justified the abandonment of their domestic laws applicable to international arbitration. Some States have gone to the other extreme, and enacted the Model Law as their domestic, as well as international, commercial arbitration regimes. In the context of its own success, we may now admit that our Model Law usefully may be revisited by the Commission. The issue is how to enhance, and to make more effective, its purpose of providing a truly international model law for international arbitration. The aim must be one of "improvement". So long as supplementary articles are complementary to the basic text, the advantage of a model law over a convention is that additional optional articles are as capable of being carried into domestic law by those States who already have applied the Model Law as those who have yet to pick it up. Hence, the mechanism of Model Law usefully avoids the chaos of successive treaty regimes, as, for example, is the case with the competing terms of the Hague, the Hague Visby and the Hamburg Rules. As to the subject of further articles and subjects for inclusion in an Annex, there are some obvious issues for consideration, some foreseen in 1985, and some identified since.

Arbitrability and parties

Although Lord Mustill recently repeated his 1985 position that UNCITRAL does not have power to deal with arbitrability, it is suggested that there is scope for the Model Law to address this issue. It may be useful to define further the matters which, subject to the public policy of domestic law, may be arbitrated, for example, disputes involving matters falling in the area of anti-trust or restraint of trade, or matters pertaining to intellectual property.

For the moment, the Model Law is silent as to the identity of parties. There should be scope for further definition of who may be parties to an international arbitration. For example, non-government organizations (NGOs) are specifically embraced by the recently promulgated Rules of the Permanent Court of Arbitration, which themselves were based on the Model Law.

Definition of arbitration agreement

UNCITRAL may now more clearly be said to have been unduly cautious in requiring signed or written exchanges for a valid submission. With the wisdom of hindsight, the Commission itself should have been ready to follow the suggestions by its present Secretary, made in 1985, in anticipation of the development of more fluid mechanisms for the completion of agreements, including terms for arbitration. Various State laws might be used as a source for broader definitions of what constitutes an agreement. There is a strong case for a more expansive definition of agreement in writing. Indeed, for consideration whether writing should always be required. The practices of electronic commerce should be directly and usefully embraced.

Confidentiality

There is now an appreciation, sharpened by the controversial Esso/BHP⁷ decision by the High Court of Australia, that the parties' requirements for confidentiality of the proceedings are not adequately protected. This issue is not touched upon, and is as ripe for coverage in the Model Law as it is in most State laws.

Consolidation

Some States have enacted optional provisions enabling consolidation of arbitral proceedings. Consolidation is not something to be forced upon the parties, but optional provisions, such as in the Australian law, usefully could be considered as an approach to be picked up by the Model Law itself.

Interest

The power to award interest, both as an element of damages in the award and also as a separate entitlement until payment under an order, is a gap partly filled by domestic laws and partly by specific agreement between the parties. But it is a subject which specifically should be covered by a complete model law. In commerce, time is money. Sometimes this is translated as "he pays me twice who pays me quickly". At least the Model Law should enable orders for compensation by the party who pays late.

Costs

Against a background of the compromise between the civil law and the differing common law approaches on the issue of costs, it is not surprising that the Model Law was not ambitious enough to make provision for costs. It would have been useful to establish a default position that the tribunal should have power to make an award for costs unless the parties otherwise agree. Again, this is an issue often covered by agreement between the parties, and by municipal laws. But it is a matter which now may be embraced by specific terms of the Model Law.

Immunity of arbitrators

Particularly by aggressive litigators within the North-American hemisphere, there is an emerging tactic of recalcitrant parties engaging in personal attacks upon the independence of the arbitration process. It is not uncommon for arbitrators now to be threatened with proceedings and claims against them personally if they do not act in a particular manner. Obviously arbitrators should be liable for a want of honesty. Possibly, they should be liable if they wilfully abandon an arbitration and put the parties to unnecessary expense. But when arbitrators are honestly discharging their duties, even if one party believes imperfectly, there should be immunity from personal liability in the same manner as is usual for a judge. Some State laws already provide for an immunity more or less equivalent to that of a judge. Such minimal protections should be universal.

Interim measures

As a matter of commercial reality, an incapacity to make effective interim measures may entirely destroy the integrity of the arbitral process. If the subject matter of dispute, or, in other cases, the funds to meet an eventual award, may be spirited away before the final award, it must follow that the procedures of the Model Law will have hollow content. There is scope to enhance powers for interim awards made in support of the arbitration. Whether made by arbitrators or by courts, such awards should become enforceable beyond the place of arbitration. To some extent, the issue relates to the further definition of what is meant by an award.

Summary

As to subject matter, the list is not exhaustive. The concept of the Model Law was radical in 1985. Now, a teenager, the child of UNCITRAL has the precocious self-confidence of success. The Commission has recently and efficiently produced its most useful UNCITRAL Notes on Organising Arbitral Proceedings (1996). It is well placed to go on to "improve" its Model Law, with an Annex of provisions. This New York Convention Day usefully may grant it the mandate to do so promptly.

Notes

1. *Resort Condominiums International Inc v Bolwell & Another* (1993) 118 ALR 655; *International Arbitration Report*, Vol. 9, no. 4, (1994), pp. A.1-A.22; *Yearbook of Commercial Arbitration*, Vol. 20, (1995), p. 628.
2. Decision of the Court of Justice of the European Union in Case C-391/95, *Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another*, 17 November 1998
3. *Canada Supreme Court Reports*, Vol 2, (1990); CLOUT Case No. 16 contained in document A/CN.9/SER.C/ABSTRACTS/1 (17 May 1993)
4. *Hilmarton Ltd. v Omnium de Traitement et de Valorisation (OTV)*, *Yearbook Commercial Arbitration*, Vol. 19, (1994), p. 655; *Yearbook Commercial Arbitration*, Vol. 20, (1995), p. 663
5. *Gilbert v Burnstine*, 255 NY 348, (1931)
6. *Chromalloy Aeroservices Inc. (US) and the Arab Republic of Egypt*, 22 *Yearbook Commercial Arbitration*, Vol. 22, (1997), pp. 691, 1001
7. *Esso Australia Resources Ltd & Ors v The Honourable Sidney James Plowman (The Minister For Energy & Minerals)*, 183 CLR 10, (1995) sometimes referred to as *Esso/BHP v Plowman*.

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