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NEW YORK CONVENTION DAY
10 JUNE 1998
United Nations Headquarters, New York
(Trusteeship Council Chamber)

The Commission decided at its thirtieth session in 1997 that a special commemorative meeting would be devoted to issues of arbitration on 10 June 1998, to celebrate the fortieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) (A/52/17, para. 259).

The programme of the meeting entitled “New York Convention Day” is set forth in the annex to the provisional agenda of the thirty-first session of the Commission (A/CN.9/443).

This document contains summaries of speeches to be delivered on New York Convention Day.

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Session 1. The Birth: forty years ago

a. The making of the Convention

Pieter Sanders

The history of the Convention goes back to 1953, when the International Chamber of Commerce (ICC) presented a draft Convention on the Enforcement of International Arbitral Awards. ECOSOC revised this approach and made it a draft Convention on Foreign Arbitral Awards. This was submitted to the three-week United Nations Conference on International Commercial Arbitration held at United Nations Headquarters, from 20 May to 10 June, 1958.

After the first week of the Conference, as delegate of the Netherlands, I presented a proposal which contained some essential changes. In the meeting of Tuesday 27 May, the proposal was welcomed by many delegates and it was decided that further discussions would take place on the basis of this Dutch proposal. This proposal finally led, with amendments, to the Convention as it stands today: no ‘double exequatur’ (like in the Geneva Convention for the Execution of Foreign Arbitral Awards of 1927) and limited grounds for refusal of recognition and enforcement (Art. V, the heart of the Convention).

The Convention has not only facilitated greatly the enforcement of arbitral awards world-wide. Today the Convention is adhered to by 116 States (and 26 extensions) and this number is still increasing each year.

The Convention has also had what we could not have anticipated in 1958 - a harmonizing effect on national arbitration laws. This is due to the UNCITRAL Model Law on International Commercial Arbitration of 1985, today adopted for international arbitration by some 28 States from different parts of the world and eight states of the United States of America. Ten States have adopted the Model Law also for domestic arbitration, this year including Germany. The Model Law virtually repeats the grounds of refusal of Article V and also has taken these grounds as grounds for the setting aside of arbitral awards. Hence, the harmonizing effect of the New York Convention.

Harmonizing the application and interpretation of the Convention is fostered by publishing national court decisions on the Convention. This has been done by the International Council for Commercial Arbitration (ICCA) since 1976. Today, 728 court decisions, coming from 42 countries, have been published in extract form in its Yearbooks. Similarly, this is done by UNCITRAL in CLOUT (Case Law On UNCITRAL Texts), not for the Convention, but for court decisions, in short extract, on texts produced by UNCITRAL, including its Model Law on International Commercial Arbitration.

Session 2. The Value: three assessments

a. Philosophy and objectives of the Convention

Robert Briner

International commercial arbitration is the servant of international business and trade. The International Chamber of Commerce, shortly after its formation in 1919, worked closely with the League of Nations in drafting the Geneva Protocol on Arbitration Clauses (1923) and the Geneva Convention for the Execution of Foreign Arbitral Awards (1927). In 1953 it produced the draft for a Convention on the Enforcement of International Arbitral Awards, which was the basis for what became the 1958 New York Convention. The Convention has been, and still is, a great success and has been ratified by 116 countries, including most major trading nations from all regions. To a large extent, therefore, the objectives set in 1953/58 have been attained.

The obvious shortcoming of the Convention is the lack of an efficient universal enforcement procedure. This problem will not be resolved in the near future.

Analysing 40 years later the objectives of the Convention—to facilitate the resolution of business disputes in the interest of international trade—one can identify the following challenges to the further development of international commercial arbitration.

As a result of globalization and privatization we find an ever-growing number of parties which lack arbitral experience, which do not have the necessary trust and confidence in arbitration and which come from regions with few arbitrators, often without the necessary training and experience.

The other problem results from the breakdown of the national court system in many countries. This forces parties to resort to arbitration, as it is faster and cheaper than litigation before State courts. These difficulties can also create problems when State courts exercise their role of supervising arbitrations.

Because of this congestion, and in the general interest of making the arbitral process even more efficient, steps have to be taken to reduce the involvement of the courts. Their supervisory role should only be exercised at the place of enforcement, employing as sole criteria the conformity of the award with international public policy. Parties should not be allowed to hold up arbitration proceedings by frivolously involving the courts. Modern legislation has done much to reduce the possibility for courts to be involved, but old protectionist habits sometimes die slowly.

The solutions to resolve these problems are not spectacular as they require many small steps in the right direction. Parallel to this, continuous attention should be given to develop mechanisms for the resolution of problems which until now have been outside the orbit of arbitration, with a view to further promote and assist international commerce: effective multi-party arbitration, the use of arbitration in tort situations, especially infringement matters and the effective enforcement of interim and protective measures pronounced by arbitrators.

b. The Convention's contribution to the globalisation of international commercial arbitration

Fali Nariman

The New York Convention 1958 came into force on June 7, 1959 with the first three ratifications. International trade was at that time almost entirely controlled by the developed world. In the ensuing thirty years there was to be a dramatic change: four billion people had entered the stream of world trade, and ninety more instruments of ratification (with extensions) had been deposited with and notified to the UN Secretary-General. Global dispute resolution was on the move.

The single most important feature of the New York Convention is that it has successfully freed the international arbitration process from domination by the law of the place of arbitration, a domination that was the characteristic attribute (and weakness) of the Geneva Protocol (1923) and the Geneva Convention (1927). Foreign awards have become more freely "transportable"from Contracting State to Contracting State under the 1958 Convention.

Other notable features of the New York Convention that have promoted globalisation of international commercial arbitration include the following:

(i) the brevity of its textual provisions facilitating their applicability to different systems of law and schools of jurisprudence;

(ii) compelling courts of the Contracting States to refer to arbitration matters raised by one of the parties in a court action, when the matters are those in respect of which parties have previously agreed that they should be so referred;

(iii) not impinging on the sovereign function of national courts to decide cases that fall within their local acknowledged jurisdictions, for example, to decide on the validity of the arbitration agreement in a court action, and to decide whether awards made within their jurisdiction should or should not be set aside or suspended;

(iv) the pro-enforcement bias of the Convention: non-interference with Contracting States' sovereign rights to enter into bilateral or multilateral treaties with other States concerning the recognition and enforcement of arbitral awards (Article VII: the more-preferred-treaty-clause of the Convention);

(v) defining clearly the extent of permissible "reservations" to the Convention (Article I(3)), thus discouraging (though not precluding) additional reservations accompanying State accessions; and

(vi) stipulating that a Contracting State is not entitled to avail itself of the benefits of the Convention except to the extent that it is itself bound by the Convention (Article XIV).

The incorporation of the entire enforcement provisions of the 1958 New York Convention into the 1985 UNCITRAL Model Law on International Commercial Arbitration has hastened the process of globalisation of international commercial arbitration.

Foreign arbitral awards made in a Contracting State continue to be enforced by courts in other Contracting States even more frequently than foreign judgements rendered by such courts: no mean achievement.

But what of the future? There are problems and more serious questions, which need to be addressed as the Convention serenely moves into the next century. For instance:

(i) Can awards made in a Contracting State which are annulled by the courts of that State nevertheless be recognised and enforced under the Convention by the courts of another Contracting State?

(ii) Do certain recent decisions by national courts jeopardise or put in peril the mutuality of rights and obligations undertaken by one Contracting State to another - by ratification on the basis of reciprocity?

(iii) Is there any reasonable prospect in the foreseeable future that the Convention would promote a universal rule-of-law regime? and

(iv) Can international commercial arbitration be truly “internationalized” through the New York Convention?

Nothing succeeds like success. But after forty years, and one hundred and sixteen ratifications (with extensions), how much more “success” can the Convention really achieve?

Session 3. The Effect: Enforceability of arbitration agreements and arbitral decisions

a. New developments on written form

Neil Kaplan

Article II(2) of the Convention states that “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”. Article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration basically follows this definition.

It is clear that certain common transactions in international trade do not come within the scope of this definition, such as brokers notes, bills of lading and agreements for salvage. Furthermore, the minutes of the discussions that led to the Convention show that Pieter Sanders attempted to include tacit acceptance because he proposed the following wording to be added to Article II(2), namely:

“Confirmation in writing by one of the parties (which is kept) without contestation by the other party”.

Unfortunately, the majority refused to accept his sensible proposal.

The Model Law drafters had an opportunity to deal with this issue, but decided that it was unwise for the Model Law and the New York Convention to provide differing definitions for something so basic. The UNCITRAL Secretariat, in a note as early as 1981, suggested that the definition of the

Model Law should be more precise and detailed "in view of the difficulties encountered in practice". It went on to suggest that any definition "should attempt to tackle these problems which relate, for example, to the involvement of intermediaries, to the commercial practice of sales confirmations or to the use of standard forms of reference to general conditions".

Many comments were received at the time which advocated a wider definition, including from Lord Wilberforce on behalf of the Chartered Institute of Arbitrators, who pointed out that, in present-day trade, many contracts were not in writing and to exclude them from arbitration from the Model Law "would be far too backward looking". Nevertheless, the UNCITRAL drafters took a cautious route.

During the last 13 years, a number of jurisdictions, even those basing themselves on the Model Law, have opted for a more expansive definition of agreement in writing.

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

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

Both England and Wales and Hong Kong have recently amended their arbitration legislation and have both opted for an extremely wide definition of "agreement in writing". Both jurisdictions recognized that there were many features of international commerce which could not be brought within the Article 7(2) straightjacket. A common example is where 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. However, a contract has clearly been entered into and it seems strange that all other terms of the contract should be enforceable, save the arbitration clause.

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". These words are reminiscent of the approach taken by Pieter Sanders in 1958.

Does a problem arise when an award rendered in a jurisdiction with a more expansive definition of agreement in writing is taken to a jurisdiction for enforcement where a narrow one still exists? In so far as the arbitration is a Model Law arbitration, non-compliance with the writing requirement of Article 7(2) may be cured by the submission to the arbitral proceedings, i.e. taking part in the arbitration without raising this jurisdictional plea as required by Article 16(2) of the Model Law.

Another helpful route might be through Article VII of the Convention itself, which provides, in effect, that the provisions of the Convention shall not "deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by law or the treaties of the country where such award is sought to be relied upon". This article featured highly in the recent *Chromalloy* case, where the United States District Court enforced an award in the United States which had been set aside in the country where the award was made. Reliance was placed, *inter alia*, on this article by the enforcing court. If parties agree to arbitrate in Country A, knowing that Country A has a

wider definition of agreements in writing to that contained in the Model Law and the New York Convention, they ought really not to be heard to complain about it if, having lost, they are taken to another jurisdiction for enforcement.

In principle there is a strong case for tightening up the definition in Article II(2) of the Convention, but of course it may not be necessary if sufficient countries opt for a wider definition of agreement in writing and enforcing courts generally give effect to the law chosen by the parties for their arbitration.

b. Non-signing parties to the arbitration agreement

Jean-Louis Delvolvé

Can an arbitration agreement be enforced against a person who has not signed it? Can such a person rely on it?

1. Basic premises:

1.1. An arbitration agreement is a contract. Principle of effect on agreements between the parties.

1.2. An arbitration agreement has the effect of establishing a private forum which bars the competence of State courts and the normal procedural guarantees that they are supposed to provide.

1.3. An arbitration agreement is based on a written document (New York Convention, article II).

1.4 A person may be bound by an arbitration agreement without having formally signed it in two instances:

(a) when that person is represented in the agreement;

(b) when the arbitration agreement or the principal contract to which it relates has been transferred to a third party who invokes it or on whom it is enforced (transfer, novation, subrogation, etc…)

2. Sources:

2.1 The New York Convention does not contain any rule on the conditions and effects of such a settlement or transfer. Neither does it prohibit them.

2.2. Research into other written sources in international treaty law: UNCITRAL Model Law. Geneva Convention 1961. Rome Convention of 19 June 1980. Unidroit.

2.3. The real sources: national laws and legal precedent, and international arbitral jurisprudence.

2.3.1 Uncertainty of the adversarial system

2.3.2 Establishment of directly applicable material rules.

3. The essential material rules:

3.1. A fundamental rule: no one may be forced to arbitration against his will.

3.2. The arbitration tribunal itself has the power to determine whether such a will exists.

3.3. Its decision is subject to control by the court which enforces or determines the validity of the arbitral decision (on appeal or annulment). Scope of that control.

4. Application (representation):

4.1. Means of representation

4.1.1 Mandate

4.1.2 Involvement of group companies in performance of a contract concluded by one of them.

4.1.3 States and "manifestations" of States

4.1.4 Ratification

5. Application (transfer)

5.1. Conditions when transfer may be imposed. Evidence and presumptions. *Intuitus personae*. Inalienability clauses.

5.2. Effects of transfer. Reciprocal obligation to submit to arbitration. Impact on the constitution of an arbitration tribunal.

6. Conclusion:

Reaffirm as a general principle of international law the rule of contractual freedom and its corollary, the principle of the effect relating to contracts.

c. Provisional and conservatory measures

V.V. Veeder

The problem is old. A better solution is needed beyond patchwork reform to national laws and institutional rules of arbitration. The continuing absence of an international legal order for enforcing abroad an arbitration tribunal's provisional and conservatory measures strikes at the heart of an effective system of justice in transnational trade. The problem was ignored in the League of Nations' 1923 Geneva Protocol on Arbitration Clauses and 1927 Convention for the Execution of Foreign Arbitral Awards; and it could not be included within the 1985 UNCITRAL Model Law on International Commercial Arbitration. The 1958 New York Convention provides no, or at least no safe, solution: the better view of its application firmly excludes any provisional order for interim measures from enforcement abroad as a New York Convention award, however urgent or necessary to safeguard the

arbitral process. How then can a party enforce, outside the arbitral seat, an order for provisional and conservatory measures? The solution lies in a supplementary convention to the 1958 New York Convention covering the enforcement by State courts of an arbitral tribunal's interim measures of protection.

There are four aspects to this answer. 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. Second, the choice of a neutral seat for the arbitration means in practice that the courts of that seat have no effective jurisdiction over the party against whom interim measures are to be enforced. Third, even where a foreign court will 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. And, of course, there are still countries where courts lack 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.

For the transnational trade, the present position is unsatisfactory. If an award can be enforced under the New York 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. If the arbitration community cannot address the problem, others will—to its great disadvantage. Already, on a purely regional basis, Article 24 of the Brussels and Lugano Conventions could soon be interpreted to allow an aggrieved party to by-pass its arbitration agreement and seek enforcement abroad of court-ordered interim measures. Such a remedy would be effective only within Western Europe; it is no sufficient solution to the problem and it could lead again to the gradual filibration of the international system of arbitration, which the UNCITRAL Model Law did so much to stop.

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 New York Convention; it would include a court's power to enforce the order in different terms; and it could also be subject to the prior leave of the arbitral tribunal making the interim order, with reasons to be given for both interim order and leave. These are details subsidiary to the overall solution. Whatever further qualifications could be required for court enforcement, it would still improve the present position. Seventy five years after the Geneva Protocol and forty years after the New York Convention, it is not now too soon to find and implement a simple, effective and practical solution.

d. Court assistance with interim measures

Sergei N. Lebedev

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 1958 New York Convention, and the 1985 UNCITRAL Model Law on International Commercial Arbitration, 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 (ILA) 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 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 UNCITRAL 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 New York Convention or the adoption of a new convention on the subject, or else in the form of an addition to the UNCITRAL Model Law, or in some other form.

e. Awards set aside at place of arbitration

Jan Paulsson

While the New York Convention creates an obligation to **enforce** foreign awards unless they are defective in one of several exhaustively defined ways, it says nothing about the grounds on which the courts of the country of origin of awards may **annul** awards. (That would have been beyond the scope of the Convention.)

This leaves it possible for the courts of the place of arbitration to nullify awards for any reason, including grounds that are completely inconsistent with dominant legislative trends (such as disapproval of the **merits** of an arbitral award) or indeed internationally intolerable (such as requiring all arbitrators to be men, or of a particular religion).

This is first of all a problem of national law. In this respect, UNCITRAL has provided an excellent mechanism for beneficial harmonization: the Model Law on International Commercial Arbitration.

But it is also a problem under the New York Convention, because Article V(1)(e) thereof allows enforcement judges a discretion to decline to accept foreign awards when they have been set aside in their country of origin, irrespective of the grounds on which they were annulled. Enforcement courts in some countries, in certain circumstances, have exercised their discretion to enforce awards notwithstanding annulment. The speaker approves those decisions inasmuch as they disregard what he calls LSAs (“local standard annulments”). He considers that refusal to enforce should be limited to the case of ISAs (“international standard annulments”), typified by those based on the criteria recognized in the Model Law.

Session 4. The Bench: Judicial Application of the New York Convention

A Panel of Judges is invited to share views on the following questions concerning the Convention

Topic I

(a) When a national court is seized of a case concerning the 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?

Note: Some examples that panelists might wish to discuss are (i) whether uniform interpretations of such terms as "agreement in writing" are desirable (Art. II); and (ii) whether in enforcing awards, courts should apply international public policy rather than national public policy (Art. V(2)). Panelists may wish to reflect the views of other judges in their countries and regions.

Topic II

(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?

Note: All these questions, except (b), could be answered with a simple "yes" or "no". While further discussion will be welcomed, please at least respond "yes" or "no" to all questions (except (b)) so that we can see if a consensus forms.

Session 5. The Future: What needs to be done

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

Gerold Herrmann

I. The project and its purpose

A. Origin: Jan Paulsson's proposal at the 1992 UNCITRAL Congress

B. Method: Primary reliance on replies to a questionnaire, drafted by IBA and UNCITRAL and sent to Governments and some arbitration experts; analysis jointly by IBA and UNCITRAL, assisted by Judy Freedberg and Silvia Borelli

C. Purpose: Enhancement of effectiveness and transparency of the Convention's operation, by disseminating information on the following points (and possibly preparing a guide to legislators)

II. Objects of search (with first results on certain points of interest)

A. Lack of any required **legislation** or of its effectiveness

B. Any restrictive requirements added to **Article I**, e.g. concerning reservations or scope of application

C. Additional requirements for referral to arbitration (**Article II**)

D. Onerous or otherwise interesting points concerning recognition and enforcement (**Article III**)
- Fees
- Competent court
- Modalities of procedure and recourse
- Time-limit for application for enforcement

E. Authentications, translations and certification (**Article IV**)

F. Variations on the refusal of enforcement, including the grounds (**Article V**)

III. Appeal to participants

Please assist in:

- securing replies from about 50 Contracting States that have not yet replied
- convincing the about 75 non-Contracting States to join the "international commercial arbitration network"
- disseminating our findings, once they are completed and published, to all Convention-users and other interested persons

b. Enhancing dissemination of information, technical assistance and training

José María Abascal

1. The internationalization of markets and the saturation of State courts have led to a universal growth in arbitration.

2. The New York Convention is the most important instrument in the 20th century on international commercial arbitration.

3. The New York Convention has given rise to abundant case law and many doctrinal commentaries.

4. All this information is concentrated and may be consulted in specialist publications on commercial arbitration, almost all of them in English.

5. This information does not reach those who should be its natural recipients: practising judges and lawyers. Many of them do not have a command of English and mistrust foreign publications in that language.

6. There is a need to provide information in reliable documents which are widely disseminated to judges and lawyers so that they can read them in their own language.

7. Measures that could be taken:

(a) Establishment of an international association of judges;

(b) Preparation by UNCITRAL of a compilation or codification of case-law and doctrine under the New York Convention;

(c) Preparation by the UNCITRAL Secretariat of an annual report on the New York Convention;

(d) Translation of the Yearbook of Commercial Arbitration into other languages; and

(e) Systematic inclusion of the New York Convention in programmes for seminars, symposiums and conferences.

c. Striving for uniform interpretation

Albert Jan van den Berg

Interpretation in 1958, 1981 and 1998

- 1958: Endeavours
- 1981: Realities

- 1998: Achievements

Methods to achieve a uniform interpretation

- Interpretative Rulings by International Authority
- Model Implementing Law
- Academic Analysis
- Comparative Case Law

Recommendations for the next 40 years

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

Werner Melis

The New York Convention reflects the realities of international arbitration of the 1950s. It is still a surprisingly modern instrument. This, and its now universal application, are good reasons not to amend it.

However, it would be a good thing to incorporate the new needs of international arbitration as they have been made apparent by practice in the last 40 years in an additional, new convention.

Amongst others, the following issues deserve consideration:

- The definition of "in writing" in the New York Convention no longer conforms with international trade practice. It would be advisable to find more flexible solutions;
- The New York Convention deals with final and binding decisions only. There is a discussion going on as to whether the enforceability of interim measures of protection should also be covered;
- Whether it is appropriate to leave it for the discretion of the judge, in enforcement proceedings, to disregard minor violations of procedure which had no bearing on the award;
- The possibility of enforcing, in third countries, awards which have been suspended or set aside by the competent authority of a country on strictly local grounds;
- Adoption of the provision of the Geneva Convention of 1961 that a plea as to the arbitrator's jurisdiction has to be raised not later than the delivery of the statement of defence relating to the substance of the dispute may be advisable; and
- It would be helpful to include into the new Convention a system for the remedy of defective arbitration clauses as in the Geneva Convention of 1961.

e. Possible issues for an Annex to the UNCITRAL Model Law

Gavan Griffith

UNCITRAL adopted its Model Law on International Commercial Arbitration on 21 June 1985 with the intent that its provisions might be enacted substantially verbatim, (in the context that the Model Law always was intended to operate within domestic legal frameworks), with the expectation that the matters it dealt with would be applied as municipal law with minimal derogation by operation of the particular laws of the enacting State. Over the last 13 years some States have enacted the Model Law with no, or only minimal, alterations. Others have used it more as a source of inspiration than as applying a prescriptive regime.

In addition to the underlying State legal frameworks, it was always contemplated that the enactment of the Model Law might be supplemented by other State laws to enhance its effective operation. Some States have enacted provisions which appropriately complement (rather than detract from) the effective operation of the Model Law, whilst preserving its basic principle, that there should be minimal court interference (Article 5).

As the Model Law comes of age, UNCITRAL might usefully revisit its terms to consider further matters to be embraced by the text. Topics for consideration, amongst others, are:

- Power to order interest as part of a damages award, including interest after the award and until payment;
- Power to order costs;
- Specific protection for arbitrators against personal liability when acting honestly;
- Provisions for confidentiality of documents, evidence and proceedings; and
- Power to order consolidation of related arbitrations.

In this manner the mechanisms of the Model Law might conveniently be enlarged to embrace a menu of further provisions without creating an unworkable complexity of disconformity, as might arise in the case of concurrent or consecutive treaty texts dealing with the same subject-matter. Clearly UNCITRAL has the capacity to present additional provisions which will be attractive to national consumers. The integrity of the Model Law would suffer no detrimental effect by the existence of sensible complementary provisions. These could be picked up easily both by States who have already adopted the Model Law, and those who have yet to enact it at all.