AFSA

The Arbitration Foundation of Southern Africa
NPC

AFSA PERSPECTIVES

IN THIS ISSUE -

RECENT DEVELOPMENTS IN INTERNATIONAL ARBITRATION IN SOUTH AFRICA

THE NEW YORK CONVENTION AFTER 60 YEARS

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NOTE FROM THE EDITOR

It is a great pleasure to introduce this Journal to you, a Journal which is a first of its kind, having its focus on arbitration in Southern Africa and which will serve both as a research tool and as an on-going record of the progress and the development of arbitration in Southern Africa and in Africa.

The main theme of this edition is the *New York Convention – 60 years later*, an assessment by a Panel of AFSA Graduates speaking from their different vantage points.

I include, in addition, two recent speeches by AFSA spokesmen.

The first, given by the AFSA chairman, Adv. Michael Kuper SC, analyses the recent history which has shaped South Africa's involvement in international arbitration and explains its burgeoning relationship, through CAJAC and through BRICS, with the Belt and Road Initiative.

The second, is a speech by Prof. David Butler, AFSA's Chief Legal Advisor, given to an audience in Beijing, which references the New York Convention in the particular context of a CAJAC initiative.

I hope you will find this Journal both informative and entertaining and will follow its progress through its future editions.

Deline Beukes : Editor

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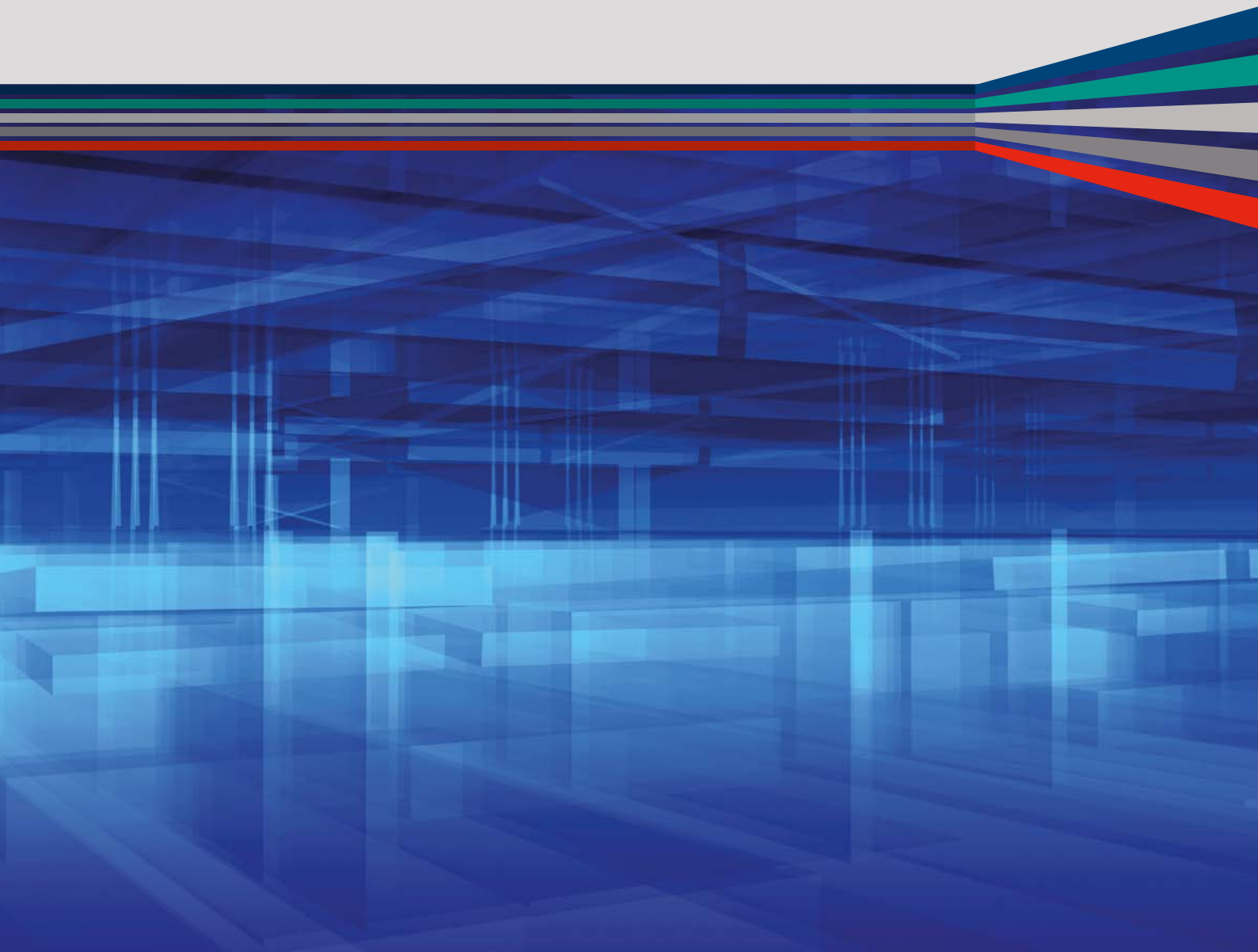


UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (NEW YORK, 10 JUNE 1958)

ARTICLE I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

ARTICLE II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. 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.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

ARTICLE III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

ARTICLE IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

   (a) The duly authenticated original award or a duly certified copy thereof;

   (b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

ARTICLE V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

   (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

   (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

   (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

   (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

   (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

   (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

   (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

ARTICLE VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

ARTICLE VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

ARTICLE VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

ARTICLE IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

ARTICLE X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

ARTICLE XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

ARTICLE XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

ARTICLE XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition and enforcement proceedings have been instituted before the denunciation takes effect.

ARTICLE XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

ARTICLE XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

ARTICLE XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

Adv. Michael Kuper SC

Michael Kuper is the Chairman of AFSA and of CAJAC Johannesburg. He is a Panel Member for SIETAC; SCIA; CAJAC and AFSA, and has served on Panels of the ICC and LCIA.

He is a member of the Expert Committee of ICDPSO and a Research Fellow of the Belt and Road Initiative, East China University (ECUPSL). He was an invited speaker at the Forum on Belt and Road Legal Cooperation (Beijing 2018) and at the Second Belt and Road Forum for International Cooperation (Thematic Forum, Beijing 2019).

He was formerly Hon. Professor in the Department of Procedural Law, University of Pretoria, and Disciplinary Commissioner for Cricket South Africa.

RECENT DEVELOPMENTS IN SOUTH AFRICAN INTERNATIONAL ARBITRATION[1]

Ladies and Gentlemen,

It is a great pleasure indeed to have the opportunity to discuss with you recent developments in international commercial arbitration in South Africa. The developments have been profound and they should be seen as part of a complex evolution, which I believe will make South Africa a regional centre of pivotal importance in the African context. Of course, these are brave words, but let me show you the basis for my optimism.

For the purpose of this discussion, I will take AFSA as a proxy for the arbitration movement in South Africa, since it is the most active player in international arbitration in the country.

For 20 years, AFSA built its reputation on the strength of its caseload generated by local disputes. For some years now, on average, 4 new matters all between local parties are registered at the AFSA Head Office each week. You will find the AFSA clause in the bulk of commercial agreements generated by the business community. But for years and years, AFSA could not develop a portfolio of international commercial disputes.

Between 2007 and 2016, AFSA received 10 referrals in all in international disputes and it dealt with them, as it was required to do, under the terms of the 1965 Arbitration Act and in accordance with its local Commercial Rules.

In 2017, following long discussions with the Department of Justice, and motivated by an incurable optimism, AFSA decided the time was ripe to open an International Division. Pat Lane was appointed the Chairman of the Division and he is assisted by a Management Committee drawn from the large attorney firms which have an international arbitration expertise. The Division set about creating a workable set of Rules designed for international arbitration and it actively spread the message that South Africa was open for international arbitration business, even although the relevant legislation had yet to be put in place. Before the opening of the International Division, 2017 had shown a slight uptick in that 3 international disputes had been referred between January and June. After the announcement of the creation of the Division, 10 new international matters were registered in the second half of that year.

On 20 December 2017, South Africa's International Arbitration Act took effect. It is a superb piece of legislation adopting the Model Law in an updated form and for that we have to thank Professor David Butler and an activist Deputy Minister of Justice, John Jeffery.

In 2018, there were 18 referrals of international disputes to AFSA's International Registrar. Those cases had a total quantum in excess of R640 million. In the 10 months of 2019, 24 new cases have been referred to AFSA with a total quantum of R3 billion.

In the last 2½ years, international commercial disputes have been referred to AFSA at the rate of about 2-3 a month.

None of this puts AFSA anywhere near the Premier League of International Arbitration Institutions. The ICC reported 842 new cases (although only 630 rank as international) in 2018 and the LCIA waded in with a caseload of 317 matters. So AFSA is not yet a player in the Premier League. Indeed, I doubt that it would be invited to play in a curtain raiser for the Premier League. In rugby parlance, it is not yet even a Japan or a Fiji – it is at best a Canada on an off-day.

But that is only if you are looking at the wrong League. The right League to look at is the African Continental League which includes those Premier League players who dabble in African commercial disputes and those arbitral institutions which operate in Africa itself. In that league, the ICC reported that in 2018 it received 42 referrals from Sub-Saharan Africa and the LCIA reported 25 matters. AFSA's 18 matters in that year – I remind you the first year in which its International

1. Extracts from Keynote address delivered by Michael Kuper SC at the Keating Chambers Conference Johannesburg on 23 October 2019.

Arbitration Legislation operated -is respectable enough and it outpaces almost every other African Arbitration Centre. There is a debate whether it is AFSA or the Cairo Centre which leads the African based pack and I may say that there is unanimity in the AFSA Secretariat that it is AFSA which is in front.

Be that as it may, the real discussion should be directed to the choices which AFSA is making in trying to position itself and South Africa to best advantage in international arbitration. That involves what I would call a three-dimensional discussion – Where does AFSA stand in relation to Europe and the West; where does it stand in relation to Asia and the East and where does it stand in relation to Africa?

Our past relationship with Europe was troubled by the negative perceptions which each side entertained in respect of the other. That relationship is now entering a much more positive phase. Nonetheless, let me touch on past problems since they may linger if not addressed.

In South Africa, as in the rest of Africa, there was anger that African disputes are not being decided by Africans in Africa, but are being decided in the capitals of Europe, largely by non-African arbitrators. This runs together with the old complaint that Western arbitral institutions are biased against developing nations. That, I may say, is not a perception which was confined to Africa. We still hear it constantly in conferences, in China and India.

Is there any basis, other than strong emotion for such complaints? Critics point to the published case statistics for the ICC and the LCIA in support of their accusation. They note that whilst Sub-Saharan Africa contributed 5.3% of new matters referred to the ICC in 2018, only 1.4% of the arbitrators appointed in ICC matters came from Sub-Saharan Africa and only in 0.9% of matters was the seat of the arbitrations a Sub-Saharan country. In contrast, whilst the West (Europe and the US) contributed 51.6% of the caseload, 71% of the appointed arbitrators came from the West and in 72% of all cases, the seat chosen was in a Western country. The same imbalance, although less extreme, existed in regard to Asia.

The LCIA reported that in 2018, there were 25 matters referred to it from Sub-Saharan Africa, 8% of its caseload, yet only 9 arbitrators, some 2½%, were appointed from Sub-Saharan Africa and only in 1 case was a Sub-Saharan country selected as the seat. Again, by contrast, there was a massive and disproportionate balance in favour of the West.

Europe has concerns of its own in regard to African arbitral institutions. It questions whether such institutions have the capacity to operate on an international level, and worries that they are paper institutions mere "wannabees" trying to play well outside their field of competence. It questions also, the quality of the African Courts and asks whether they support international arbitration and, in any event, whether they can process matters efficiently.

But when all is said and done, and irrespective of the grievances and the complaints which we may have, Europe remains a leading purveyor of arbitration skills and South Africa needs those skills. Its involvement with European arbitration should be by way of direct contact with the attorney firms of outstanding reputation in the practice of international arbitration and with the arbitrators who have rightly earned a global reputation.

I see the future relationship between South Africa and Europe as operating on that level. This requires AFSA to interest the leading international firms in the idea of participating in South African international arbitration and lending their cumulative skill and guidance to its work.

That relationship is exemplified in the involvement of firms, like Pinsent Masons, Allen & Overy, Clyde & Co., Eversheds Sutherland, Herbert Smith Freehills and Hogan Lovell, all of whom have taken founding membership in AFSA, a commitment of indescribable value for South Africa in building its international arbitral future. So too the assistance and guidance given by Keating Chambers and 39 Essex Chambers among the London sets is enormously helpful.

As we speak the final touches are being given to the new AFSA Rules by an international team of immense stature led by Prof. Dr. Maxi Scherer. It all bodes well for a positive and mutually beneficial relationship.

Let me turn to the question of China.

What I say needs to be seen in the context described by Peter Frankopan, Professor of Global History at Oxford University, in his recent book "The New Silk Roads: The Present and Future of the World":

"We are already living in the Asian century" he writes.

"The shift of global GDP from the developed economies of the west to those of the east has been breathtaking in both scale and speed."

Speaking of the Belt and Road Initiative, he notes that China's trade with Belt and Road countries in 2018

already exceed 5 trillion dollars and that its stated purpose is to design an open and inclusive process to improve global development patterns, global governance and global cooperation.

The Belt and Road Initiative, the romantic resurrection of the Silk Road, was announced in 2013. In 2012, the China Law Society, China's proxy in initiating legal relationships with foreign entities, had already made its initial contact with AFSA in order to begin discussions intended to involve AFSA in the creative task of helping to design an arbitral mechanism for the African Silk Road.

Those discussions were not conducted upon the basis that AFSA was a passive party. On the contrary, it was apparent from the start that interaction between AFSA and the Chinese arbitral institutions, to which it would be introduced, was to take place by joining hands and working together to initiate, promote and establish a transcontinental arbitral mechanism.

At that time, I must confess, we knew nothing about China; nothing of its legal system and nothing of its culture and business norms. I doubt that at that time amongst all our legal practitioners more than one or two had ever been to China. AFSA convened a meeting of all its founding members and stakeholders to discuss that invitation. We knew enough to know that it would likely redirect our primary commitments and energies to the East and that it was a leap into the unknown.

Nonetheless, the consensus of the AFSA stakeholders was that this was the "only game in town"; that if South Africa was to find a place in the world of international arbitration, it would be by way of the Silk Road.

We have never regretted that decision. Declarations of Intent were then issued in both Beijing and Johannesburg committing both sides to the design and development of an arbitral mechanism to resolve commercial and investment disputes arising between Chinese and African parties. The 51 Nation States that make up the membership of the Forum of China-Africa Cooperation endorsed the establishment of this mechanism called "CAJAC" in the Johannesburg Action Plan which the FOCAC issued in 2016 and which it repeated in the Beijing Action Plan of 2018.

The format of the CAJAC project has been an institutional partnership between designated arbitral institutions in Africa and China. The partners today are AFSA; the Nairobi International Arbitration Centre; OHADA; the Shanghai International Arbitration Centre; the Beijing International Arbitration Centre and the Shenzhen Court of International Arbitration. These partners have established a relationship of immense goodwill between them; they have, following lengthy discussions, reached final drafts both of the Constitution and of the Rules.

It is now intended that during Johannesburg Arbitration Week, we and our partners will meet to sign the constitution and the Rules. Then for the first time, Chinese and African business will have a finalised dispute resolution platform, a platform which China and Africa jointly created on the basis of equality and shared commitment.

AFSA's work in the CAJAC project has exposed AFSA to Chinese arbitral and legal practice and that has been a major breakthrough in widening the horizons of South African legal practitioners.

CAJAC has given South Africa a stake in the Belt and Road Initiative and the opportunities which flow are manifold.

AFSA has been accepted by its institutional partners and by the China Law Society and by the Chinese Government as a team player in the work of designing and constructing the arbitral mechanisms for the Belt and Road Initiative. AFSA has been invited to speak and to participate in the two Belt and Road Conferences and AFSA is a member of International Commercial Dispute Prevention and Settlement Organisation, which leads the design process. It is this Organisation which in collaboration with foreign service providers, such as AFSA, has as its goal to provide Belt and Road countries with a full chain service comprising pre-dispute prevention, consultation and dispute settlement.

BRICS, of course, is a major subset of this broad Initiative. The planning for the BRICS Initiative mechanism follows the inspiration of the CAJAC design, namely that the Initiative should be carried forward through a partnership between BRICS Arbitration Centres designated by each participating country.

I am delighted to say that at the Rio de Janeiro BRICS Conference held recently, AFSA was designated to establish the South African BRICS Centre and it will begin work on that project immediately.

These projects are still in their infancy and they will take time to mature to begin to reach their vast potential.

Nonetheless, and as of now, AFSA's commitment to the Belt and Road Initiative has catapulted it and South Africa, into an initiative which may well transform international arbitration practice on a global scale.

Finally, I wish to address the relationship between AFSA and South Africa and Africa.

It was never AFSA's intention to build an exclusive and inward-looking Arbitration Centre. On the contrary, it has been its mission to extend its work throughout Southern Africa and to build bridges across the continent.

This philosophy flows from the realisation that Africa's colonial legacy precludes the emergence of a unified jurisprudence. Countries which are neighbours follow very different legal traditions and legal systems and that has confounded the necessary interconnection between legal and business communities in Africa. We believe that the essential unifying factor which will bring African countries together is a shared arbitral system.

A necessary precursor to that system is the standardisation and harmonisation of arbitral practice in the African regions. West Africa has taken the lead in that regard and the emergence of OHADA is a good example of the direction which other regions of Africa ought to take.

AFSA was, therefore, immediately receptive to a proposal from the Association of SADC Law Societies that AFSA should commence to standardise and harmonise arbitral practice in SADC and AFSA has committed itself to do so. That work is now beginning and it is just in time given the continent's commitment to the establishment of Free Trade areas and like initiatives which depend upon the support of adequate dispute resolution mechanisms.

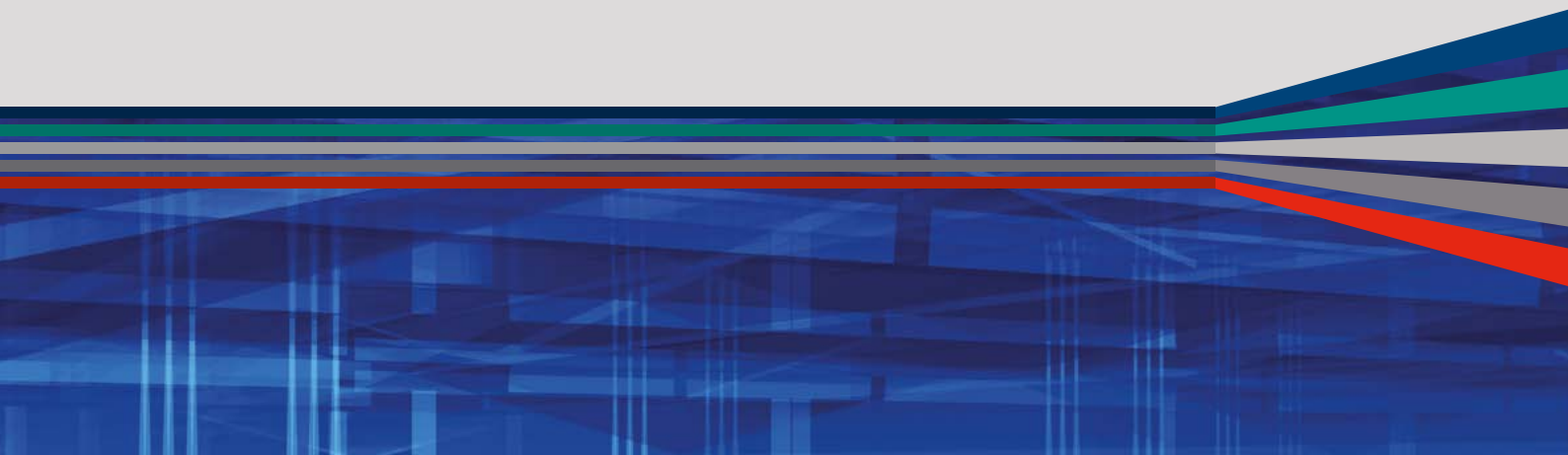
In the result, I want to suggest that South Africa is becoming one of the most exciting Centres for the practice and the development of international arbitration. Good fortune and a lot of hard work has given AFSA an opportunity to have a voice in the further development and the new direction of global arbitration and it has a unique opportunity to serve the country and to serve the continent in helping to build arbitral structures which are inclusive and of high quality.

Ladies and Gentlemen, on 17 – 19 March 2020 AFSA and its co-hosts will present Johannesburg Arbitration to delegates from Europe, Great Britain, China and Africa. The themes upon which I have touched will feature prominently. May I urge you to join us and guide us in the discussions which will ensue.

Thank you.

The New York Convention was established as a result of dissatisfaction with the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. The initiative to replace the Geneva treaties came from the International Chamber of Commerce (ICC), which issued a preliminary draft convention in 1953. The ICC's initiative was taken over by the United Nations Economic and Social Council ("ECOSOC"), which produced an amended draft convention in 1955. That draft was discussed during a conference at the United Nations Headquarters in May-June 1958, which led to the establishment of the New York Convention.

Extract taken from http://www.newyorkconvention.org/travaux+preparatoires/history+1923+-+1958



Prof. David Butler

David Butler is Emeritus Professor in Mercantile Law at Stellenbosch University, South Africa, where he has taught International Commercial Arbitration for many years as part of the LLM programme. He was the author of the SA Law Reform Commission's report *Arbitration: An International Arbitration Act for South Africa* in 1998. He was advisor to the Department of Justice throughout the parliamentary process leading to the commencement of the International Arbitration Act on 20 December 2017. He serves on the SALRC's Project Committee on ADR, which is considering the desirability of legislation in South Africa to promote mediation. He is involved in arbitrator training for two South African arbitration institutions, including AFSA, and has also served on committees tasked with drafting arbitration rules, including the committee of CAJAC (Johannesburg) which drew up the first draft of the proposed Standard CAJAC Rules. He is a regular speaker at conferences on arbitration and ADR in South Africa and elsewhere in Africa. His particular research interest is on the development of arbitration law and practice in African jurisdictions.

"THE IMPORTANCE OF THE NEW YORK CONVENTION FOR THE DEVELOPMENT OF TRADE AND INVESTMENT BETWEEN CHINA AND AFRICA - POSSIBLE PITFALLS AND THE POTENTIAL CONTRIBUTION OF CAJAC"*

*By Prof David W Butler***

1) Introduction

I regard it as a great honour to be invited to speak at this conference in Beijing, which is being held to celebrate the 60th anniversary of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("NYC") and to scrutinise the role of the Convention going forward. The conference will investigate the support that the Convention can provide for the "Belt and Road Initiative" and the role of the Convention in Investor-State Dispute Settlement (ISDS).

As I was born in South Africa and have spent my working life there, it should come as no surprise that I intend to approach these topics from an African perspective, with particular reference to South Africa. Forty African jurisdictions are now parties to the NYC.[1] African countries are increasingly looking towards China for trade and foreign investment. China is increasingly involved in major infrastructure projects in Africa: a particularly exciting and impressive example is the new standard gauge railway (SGR) between Mombasa and Nairobi in Kenya,[2] which has provided a major impetus for economic development in East Africa.

Chinese exporters and investors in Africa are rightly concerned about the availability of effective mechanisms for resolving commercial and investment disputes which arise in an African context. My presence here today is not only due to the kindness of the organisers, but also to CAJAC (the China-Africa Joint Arbitration Centre), which initiated the invitation. CAJAC is playing an important and vibrant role in creating trust and understanding regarding international arbitration between China and Africa. Operating through its accredited Centres in China and Africa, CAJAC is in the process of establishing a viable and attractive administered arbitration service for resolving the disputes to which I have just referred.

2) South African legislation giving effect to the New York Convention

The South African Law Reform Commission (SALRC) in its 1998 report, quoting the English jurist Lord Mustill, aptly described the NYC as "the most successful international instrument in the field of arbitration" which could also perhaps "lay claim to be the most effective instance of international legislation in the entire history of commercial law".[3] Lord Mustill was of course writing in the pre-internet era. Fortunately, far-sighted scholars and practitioners, with the support of UNCITRAL are making sure that the NYC retains its pre-eminent position, through making scholarship and court decisions readily available on the internet.[4] African-based scholars, practitioners and judges are often at a disadvantage compared to their better-resourced colleagues elsewhere in the world. When working with the NYC, that excuse has become more difficult to justify.

In common-law jurisdictions, when the country concerned has acceded to a multilateral international convention, it is normally necessary for the treaty to be adopted by means of legislation to make it part of domestic law.[5] When South Africa acceded to the New York Convention in 1976, the legislation intended to give effect to that accession contained serious defects.[6]

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* Paper presented at the International Conference on Celebrating the 60th Anniversary of the New York Convention in Beijing on 3 November 2018.

** Professor Emeritus in Mercantile Law and research fellow at Stellenbosch University, Western Cape, South Africa.

1. See E Onyema (ed) Rethinking the Role of African National Courts in Arbitration (Wolters Kluwer 2018) 4 n 5; see also www.uncitral.org
2. See e.g. https://www.railway-technology.com/projects/mombasa-nairobi-standard-gauge-railway-project/. The SGR replaces the so-called "Cape gauge" narrow gauge line of 3 feet 6 inches (approximately one metre) used throughout the British colonies in Southern and east Africa during the colonial era.
3. See the SALRC report Arbitration: *an International Arbitration Act for South Africa* (July 1998) 107 para 3.3, quoting Mustill M J "Arbitration: History and Background" (1989) 6(2) *Journal of International Arbitration* 43 at 49.
4. See e.g www/newyorkconvention1958.org. The website was devised and is kept up to date by Columbia law School and Shearman and Sterling in association with UNCITRAL. It has the *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (2016) and 2684 cases (as at 27 October 2018) on the NYC as well as the *travaux préparatoires*.
5. See e.g. the Constitution of the Republic of South Africa, 1996 s 231.
6. See the SALRC report in fn 3 above paras 3.13-3.15 regarding the defects in the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977. As appears from the text below this legislation has been repealed and replaced by the International Arbitration Act 15 of 2017.

As pointed out by the SALRC in 1998, the legislation made no provision for the court's obligation under the Convention to enforce arbitration agreements, with the result that South African courts retained their statutory discretion under the existing arbitration legislation to decline to enforce a valid arbitration agreement covering an existing dispute.[7] Moreover, the statute appeared to give the court a discretion whether or not to enforce a foreign award, instead of imposing an obligation to this effect, unless one of the seven defences was proved.[8] Another of the statute's idiosyncrasies was that if an award was made in a foreign currency, it had to be converted into local currency at the exchange rate prevailing at the date of the award.[9] Whether intended or not, this provision since 1977 has mainly operated in favour of locally based defendants. Although the drafters of the NYC intended that it should have a pro-enforcement bias in relation to foreign arbitral awards,[10] it may fairly be said that in the 1977 South African legislation that this intention became "lost in translation". Another obstacle to enforcement was created by the Protection of Businesses Act 99 of 1978 in that certain awards, particularly those concerning transactions relating to raw materials or substances from which physical things are made, could only be enforced with the written consent of the Minister of Trade and Industry.[11] This provision was obviously contrary to South Africa's obligations under the Convention.[12]

The primary purpose of South Africa's International Arbitration Act 15 of 2017[13] was to give effect to the UNCITRAL Model Law on International Commercial Arbitration in South African law for international commercial disputes.[14] Nevertheless, the Act repealed the 1977 Act and replaced it with legislation which does comply with South Africa's obligations under the NYC.[15] In addition, the Protection of Businesses Act was amended so that it no longer applies to arbitral awards.[16] It should also be mentioned that South African courts have a good record in deciding on applications for the enforcement of foreign arbitral awards, judging by the few reported cases,[17] notwithstanding the defects in the previous legislation.

3) National procedures for enforcing Convention awards in an African context

Article III of the NYC makes it clear that the substantive conditions applicable to the recognition and enforcement of foreign arbitral awards are those set out in the NYC. However Article III permits each state to apply its own rules of procedure to the recognition and enforcement of foreign arbitral awards. Nevertheless, national rules of procedure may not impose "substantially more onerous conditions or higher fees or charges" than those applying to the enforcement of domestic awards.[18] While the Convention imposes a form of "national treatment" and non-discrimination against foreign awards regarding procedure, as Born points out, the Convention does not require that the local rules for enforcing arbitral awards be either expeditious or efficient.[19] This presents a problem in some African states, particularly where the civil justice system is under-resourced and is faced with a serious backlog of cases. The NYC offers a potential solution. While the second sentence of article III prevents discrimination against foreign awards regarding procedural mechanisms for their

7. Compare Article II of the NYC with the Arbitration Act 42 of 1965 s 6, which since the commencement of the International Arbitration Act 15 of 2017, is confined to domestic arbitration. The Constitutional Court in *De Lange v Methodist Church* 2016 2 SA 1 (CC) paras 36 and 37 rightly cautioned courts against being too ready to exercise their discretion against enforcement of arbitration agreements as this will undermine the goals of private arbitration. Although the judgment was concerned with s 3(2), the comments apply equally to s 6.
8. Act 40 of 1977 s 2(1).
9. S 2(2).
10. See Sanders' foreword to the *ICCA Guide to the Interpretation of the 1958 New York Convention* v.
11. S 1. Although it seems that the minister was normally prepared to grant consent (see e.g. *Seton Co v Silveroak Industries Ltd* 2000 2 SA 215 (T) at 226 C), the need to obtain such consent was an unnecessary cause of delay. The requirement was in any event superfluous in the case of convention awards, as the public policy defence in Article V(2)(b) of the Convention provides adequate protection.
12. See Butler "The international Arbitration Act 15 of 2017: Unpacking the Model Law and the enforcement of foreign arbitral awards under the Act" in Hugo (ed) *Annual Banking Law Update 2018: Recent Legal Developments of Special Interest to Banks* (Juta, 2018) 87 110-111.
13. The SALRC commenced work on the drafting of this legislation in 1996. The gestation period of the African elephant is 22 months. It took approximately 12 times longer before the International Arbitration Act took effect, and we could be waiting still but for the determination and competence displayed by the current Deputy Minister of Justice, Mr John Jeffery in shepherding the Bill through parliament in 2017.
14. See Butler "Unpacking the Model Law" (2018) n 12 above 91-104 for a discussion of South Africa's version of the Model Law, which is closely based on the 2006 text, but with a few adaptations and additions.
15. See ss 14-19 in ch 3 of Act 15 of 2017, which commenced on 20 December 2017 (see GN 1454 in GG of 20 December 2017).
16. Act 15 of 2017 s 21 and sch 4.
17. See eg *Phoenix Shipping Corporation v DHL Global Forwarding SA (Pty) Ltd: MV Cos Prosperity* 2012 3 SA 381 (WCC); *Seton Co v Silveroak Industries Ltd* 2000 2 SA 215 (T); *Balkan Energy Ltd v Government of Ghana* 2017 5 SA 428 (GJ).
18. See the *UNCITRAL Secretariat Guide* n 4 above 77 paras 3 and 5.
19. G Born *International Commercial Arbitration* (2nd edition, 2014, Wolters Kluwer) 3408.

recognition and enforcement, nothing prevents a member state from adopting less onerous procedures for the enforcement of foreign awards.[20] For African states wishing to portray themselves as arbitration friendly, it is up to the arbitration community in that state to exert pressure to ensure that the court rules regarding arbitration applications are fit for purpose.

The drafters of the South African International Arbitration Act were aware of the desirability of expedited court rules for arbitration proceedings. The inclusion of a provision to this effect in the Bill would have been controversial and risked slowing down the legislative process.[21] However, this concern appears to have been addressed, at least in Gauteng province, the economic heartland of South Africa, by the recent creation of a Commercial Court within the existing High Court.[22] The relevant Practice Directive envisages a system of case management by judges and expedited hearing dates. Arbitration is included in the list of matters regarded as "commercial"[23] and arbitration applications in Gauteng may now be referred to the Commercial Court.

4) Protection of Chinese investors in Africa, with particular reference to South Africa

One of the themes of this conference is the NYC and Investor-State Dispute Settlement (ISDS). A substantial majority of African states are members of ICSID, although South Africa is a notable exception. However, even if a foreign investor comes from an ICSID member state and invests in another ICSID member state, this by itself will of course be insufficient to give ICSID jurisdiction under article 25 of the ICSID Convention. Consent of the parties has been referred to as "the cornerstone of the jurisdiction of the Centre".[24] Where the host state has given consent and the dispute is referred to ICSID, the arbitration takes place under public international law and the need to resort to the NYC for the enforcement of the award falls away.[25] When, however, ISDS takes place under the national law of the seat of the arbitration, the NYC could be needed to assist with the recognition and enforcement of an award in the absence of voluntary compliance. Moreover, ICSID typically acquires jurisdiction by reason of a bilateral investment treaty (BIT) between the investor's home state and the host state. In practice, a substantial number of African states have been reluctant to enter into BITs, particularly with fellow African states.

South Africa is known to be averse to BITs and the government's decision to cancel the majority of South Africa's BITs with European states or to allow them to lapse has attracted a great deal of publicity.[26] These BITs were correctly perceived by the South African government as giving too much substantive protection to foreign investors at the expense of the government's right and constitutional obligation to regulate in order to address the needs of the many underprivileged people and communities in South African society. Since the commencement of the Protection of Investment Act 22 of 2015 ("PIA") on 13 July 2018,[27] this legislation is regarded as providing the main basis for the legal protection of foreign investors under South African law.

However, in reality, the position is more complex. According to UNCTAD,[28] South Africa has signed 49 BITs since 1994. Some have not come into force, some

20. See the UNCITRAL Secretariat Guide n 4 above 90 para 34.
21. It can also be argued that such a provision is in any event unnecessary. Such rules could apparently be drafted under the Rules Board for Courts of Law Act 107 of 1985, as amended, ss 6(1)(t) and 2(a). See Butler "Unpacking the Model Law" (2018) n 12 above 113-114, especially n 194.
22. See the Commercial Court Practice Directive, distributed on 3 October 2018, with immediate effect.
23. See the Schedule to the Practice Directive, item (k).
24. See the SALRC report in n 3 above para 4.14.
25. See the ICSID Convention arts 53-55 regarding the recognition and enforcement of ICSID awards.
26. See e.g. A Langalanga *Imagining South Africa's Foreign Investment Regulatory Regime in a Global Context* (SAIIA Occasional Paper 214, May 2015); Butler "The attitude of the South African Government to Arbitration" in SOAS *Arbitration in Africa Conference* 2017 65 69-75. The government's change in attitude to BITs was caused at least in part by *Piero Foresti, Laura De Carli and others v Republic of South Africa* Case no ARB(AF)/07/1, in which an Italian investor challenged the validity of aspects of South Africa's new mining legislation under the Italy-South Africa BIT. The case was withdrawn after the matter was settled. See further J Brickhill & M Du Plessis "Two's Company, Three's a Crowd: Public Interest Intervention in Investor-State Arbitration (*Piero Foresti V South Africa*)" (2011) 27 *SA Journal on Human Rights* 152-166.
27. See GN 395 of 2018 in GG 41766 of 13 July 2018.
28. See www/investmentpolicyhub.unctad.org/IIA/CountryBits/195.

have been terminated, but eleven, including those with China, Russia and Nigeria, are still in force. Thus, when it comes to investment protection, foreign investors in South Africa fall into at least three categories.[29] The first category is those investors who on 13 July 2018 were protected under the sunset clause of a terminated BIT.[30] The second comprises investors protected by a BIT still in force. The third consists of investors protected under PIA. Only the legal position of the last two categories will be briefly discussed in this paper.

Foreign investors from countries which still have a BIT with South Africa in operation will continue to be protected under the BIT.[31] Regarding dispute resolution, the ISDS clause (article 9) in the China-South Africa BIT, signed on 30 December 1997, serves as an example. As one would expect, the parties to the dispute must first attempt to resolve the dispute through amicable negotiation. If such attempts fail to resolve the dispute within 6 months, either party may require the dispute to be referred to an international arbitration tribunal established under article 9.[32] The tribunal must determine its own procedure, but may take guidance from the ICSID Arbitration Rules. The tribunal is required to apply the substantive law of the host state to the dispute, as well as generally recognised principles of international law accepted by both states.

For foreign investors subject to PIA, the ISDS provision of PIA, section 13, is very different. The investor has no right to have the dispute submitted to international arbitration. Instead, section 13 of PIA provides that the investor may refer the dispute to mediation, with the appointment of the mediator being facilitated by the Department of Trade and Industry.[33] The investor may also refer the dispute for resolution to a competent court or other "independent tribunal"[34] at any stage. Section 13(5) of PIA does state that the government may consent to international arbitration in relation to an investment, subject to the exhaustion of domestic remedies. However, it is clear that the international arbitration referred to is arbitration between South Africa and the investor's home state and that both states would first have to consent to the arbitration.

In short, a Chinese investor in South Africa, who becomes involved in a dispute with the state regarding that investment, will still be entitled to refer that dispute to investment arbitration, subject to the terms of the BIT. As that arbitration will take place under the arbitration law of the seat, the NYC could play a role in the recognition and enforcement of that award in another state in the absence of voluntary compliance.

5) The Role of CAJAC in promoting trust in international arbitration between Chinese and African parties

One of the longest established and best functioning African arbitral institutions, namely CRCICA,[35] is a juristic person under international law. At least two other arbitration centres, namely the Nairobi Centre for International Arbitration (NCIA)[36] in Kenya and the Kigali International Arbitration Centre (KIAC)[37] in Rwanda are established under national legislation. Establishment under national law confers a certain status and aura of stability, but it will still be necessary for the centre concerned to establish a reputation for independence, impartiality and competence when administering an international commercial arbitration with one local party.

In South Africa, the Arbitration Foundation of Sothern Africa was established in 1996 as a non-

29. There is arguably a fourth category, namely investments not protected by the sunset clause in a BIT and which were made before the commencement of PIA on 13 July 2018. S 15(2) of PIA states that such investments made prior to the "promulgation" of PIA are governed by general South African law. "Promulgation" usually refers to publication in the Government Gazette, which in the case of PIA occurred on 15 December 2015 in GG 39514 of that date. In the context, the word "promulgation" in s 15(2) should arguably be interpreted as "commencement". A possibly stronger counter-argument is that if "promulgation" has its ordinary meaning, investments made since 15 December 2015 will be protected under PIA.
30. S 15(1) of PIA states that "existing investments" made under BITs will continue to be protected under the sunset clause of the BIT.
31. See PIA s 3(c).
32. Art 9(2) nevertheless provides that the host state may require the investor to initiate administrative review procedures in accordance with its laws and regulations, provided that the investor has not submitted the dispute to a domestic court of the host state.
33. The Rules for the mediation are prescribed by regulation and may be found in GG 41767 of 13 July 2018.
34. It is submitted that the reference to an "independent tribunal" in s 13(4) must be understood as a reference to a tribunal provided by the state, like the Competition Tribunal. Compare the reference to "independent and impartial tribunal" in the access to courts provision s 34 of the Constitution of South Africa, 1996. In *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 4 SA 529 (CC) paras 211-214 such tribunals were understood as referring to tribunals provided by the state, excluding private arbitral tribunals.
35. The Cairo Regional Centre for International Commercial Arbitration, which now has its rules in Arabic, English and French. This is indicative of its aim to develop a higher profile in North and sub-Saharan Africa. See further www.crcica.eg.
36. Established under the Nairobi Centre for International Arbitration Act 26 of 2013, which commenced on 25 January 2015. See further www.ncia.or.ke.
37. Established under Law 51/2010 of 10January 2010 See further www.kiac.org.rw.

profit company to provide administered arbitration services, with support from within the legal and accounting professions and the commercial sector. Since its formation, AFSA has established itself as the pre-eminent arbitration body providing administered arbitration services in Southern Africa. Its success is in no small measure due to the vision and dedication of its founding chairman, Adv Michael Kuper SC. When FOCAC (the Forum of China Africa Cooperation) published an action plan in December 2015 to establish the China Africa Joint Arbitration Centre, AFSA was the logical arbitral institution to be the accredited participating institution to represent Southern Africa. The FOCAC action plan, with the enthusiastic support of the China Law Society, conceived "the framework for the establishment and operation of CAJAC in China and Africa in accordance with a win-win spirit of cooperation and also consistent with the aims and ideals of the Belt and Road Initiative".[38] CAJAC is intended to provide an administered arbitration service of high quality to resolve disputes which are susceptible to resolution by law, as may arise between Chinese and African entities. Its further aims include the creation and development of "a shared arbitral jurisprudence with a cross-cultural empathy for the benefit and guidance of the legal, business and investment communities of China and Africa".[39]

It is envisaged that each participating arbitration centre, whether based in China or Africa, will use the same standard CAJAC Arbitration Rules. The first draft, recently distributed to participating entities for comment, is closely based on the rules of one of the participating Chinese Arbitration Centres. The Chinese arbitration community are convinced that the arbitral processes reflected in their rules, while fully compliant with international standards regarding fairness and due process, are inherently more efficient and expeditious than the processes provided by the rules of arbitration institutions based in the West, particularly where the rules have been too heavily influenced by common-law adversarial-style procedures. We in Africa are happy to learn from the Chinese experience and to apply it, where it is in our mutual interests to do so. It is provisionally envisaged that certain matters will not be dealt with in the CAJAC Standard Procedure Rules where there are presently marked differences between current arbitration laws of Africa and the arbitration law of China[40] and that in these instances, participating centres will develop local rules to provide for local circumstances. The CAJAC Standard Rules have the potential to play an important role in the establishment of a shared arbitration culture between China and Africa.

6) Concluding comments

I have been involved in research on and the teaching of international commercial arbitration to post-graduate university students for many years. The focus of my research on international conventions and national arbitration statutes has been primarily on the New York Convention and the UNCITRAL Model Law. Regarding international arbitration rules, apart from the UNCITRAL Arbitration Rules for ad hoc arbitration,[41] my main examples of institutional rules for administered arbitration have been those of arbitral institutions based in Western Europe and the United Kingdom. It has been fascinating to observe the development of arbitration law and practice over the last 25 years. It is this evolutionary development that makes the subject such a stimulating academic discipline. The rapid development of trading and investment links between China and Africa provides the necessary justification to focus more on south-south and African-Asian arbitration law and practice going forward.

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38. See the preamble to the Draft CAJAC Constitution para 1.2.
39. See the Draft CAJAC Constitution para 3.
40. For example, the 2006 text of the UNCITRAL Model Law, which has been adopted by three African jurisdictions including South Africa, contains extensive provisions on tribunal-ordered interim measures. This is fundamentally different to the position under the rules of Chinese arbitration centres. Also, China has well-settled practices regarding the use of mediation in conjunction with arbitration. In South Africa the SALRC is currently investigating the desirability of legislation to promote mediation. Certain established mediation practitioners in South Africa are strongly opposed to the notion that the same person may act as both mediator and arbitrator in relation to the same dispute.
41. This includes the rules of CRCICA and the Singapore International Arbitration Centre (SIAC), whose own rules are based on those of UNCITRAL.

Adv. Ori Ben-Zeev

Ori Ben-zeev is an advocate and arbitrator in practice at the Johannesburg Society of Advocates, where he was admitted in 2013. Prior to this he acted as a clerk to Justices Skweyiya and Zondo at the Constitutional Court of South Africa.

Ori has participated in a number of domestic and cross-border arbitrations and mediations, primarily in the education and transport sectors. He has a diverse practice that is focused on a blend of commercial as well as constitutional law, and covers banking law, telecommunications and cyber law, and human rights law.

In 2016 Ori initiated and developed the Human Rights Court, a moot court focused on providing students, particularly black women, with a practical experience of the work of an advocate. The initiative was successfully launched in December 2016 and has run on an annual basis since then. He has also presented a seminar on effective litigation and on legislative drafting to the Law Society of the Northern Provinces.

Mediation and arbitration remain underdeveloped and underutilised in South Africa, despite their greater flexibility and potential. Ori believes that a growing awareness of these mechanisms and their benefits shall lead to a more effective and more inclusive system of dispute resolution.

INTERNATIONAL COMMERCIAL ARBITRATION

By Adv Ori Ben-Zeev

Does the New York Convention provide a viable framework for international commercial arbitration?
What are its flaws and how might they be corrected?
If you were to update the convention, what changes would you make?

INTRODUCTION

1. Arbitration tribunals do not have any of the coercive powers that a national court has.[1] In the absence of full cooperation by the losing party, the practical effect of an arbitral award is therefore dependent on a national court exercising its powers to enforce that award. Redfern *et al* accordingly note that:[2]

   "one of the most important features of an award in an international commercial arbitration is that it should be readily transportable. It must be capable of being taken from the state in which it was made, under one system of law, to other states in which it is able to qualify for recognition and enforcement, under different systems of law. To render an award effective, means must be available for enforcing it and these means must be available internationally and not simply in the country in which the award was made."

2. At a logical level the transportability of an international arbitration is unquestionable. Frequently these involve parties of different nationalities that are located (and whose assets are located) within different states, over which different laws may apply.

3. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the "**Convention**") was designed to provide the international means to enforce an arbitration award under the various jurisdictions of states that are party to the Convention. These shall be referred to herein as "**contracting states**".

4. In order to achieve these goals effectively it is submitted that the Convention should meet, at the very least, the following two criteria:

   4.1. It should enjoy broad support internationally – in other words, the more signatories that the Convention attracts the more successful it is (the "**international support criterion**"); and

   4.2. It should provide for the effective and efficient recognition and enforcement of arbitration awards within every jurisdiction that has acceded to the convention – in other words, it should ensure that arbitral awards are ordinarily recognised and enforced within signatory nations unless there are compelling reasons not to do so (the "**effectiveness criterion**").

5. If the Convention were not accepted by the majority of nations, or even by a significant number of nations, it would have failed in its task because it fails to garner international respect. Its provisions, regardless of how effective they may be in principle, would not be followed or enjoy the support of a domestic court asked to enforce or recognise an international arbitration. A party seeking to enforce an arbitral award would find itself limited in the few jurisdictions in which the Convention would apply, and therefore could ordinarily not rely on the Convention.

6. On the other hand, if the terms of the Convention were such that they did not provide an effective and efficient means to ensure the recognition and enforcement of an arbitral award, then its purpose would not be met, even if it enjoyed universal recognition. This is because the winning party in an arbitration requires an effective and efficient means of the recognition and enforcement of the that award – otherwise the award has minimal practical effect.

1. Redfern et al (2004) at 10-20.
2. id at 10-20.

7. On the whole, the Convention is a success: it enjoys broad international support and provides an effective and efficient framework for the enforcement of arbitral awards.

8. The Convention, however, suffers from two serious flaws: the first is that a state party to the Convention may declare that the convention shall apply only to legal relationships that are considered as "commercial".[3] The second is that a court may refuse to recognise or enforce an arbitral award if it is contrary to the public policy of that contracting state.[4]

9. It would appear that these provisions were included in the Convention to promote the international support criterion: in other words, the rationale behind this clause is to allay the fears of a contracting state that its domestic laws may be overridden by the Convention.[5]

10. The two articles, however, hold a significant threat to the effectiveness of the Convention in those very contracting states that they serve to assuage. In effect, they make the Convention subject to the domestic law of the contracting state, which undermines the very purpose of the arbitration.

11. There is certainly a balance that can be struck between respecting the domestic law of contracting states while giving meaningful effect to an international arbitration that has been decided on a system of laws other than that of the contracting state. That balance in fact is satisfactorily met by Article V(2)(a) of the Convention, which provides that a competent authority may refuse to recognise or enforce an arbitral award if it finds that the subject matter of the difference is not capable of settlement by arbitration under the law of that country. This is a provision that has not been utilised for its full value, notwithstanding the fact that it would be easy for states to determine what may and may not be subjected to arbitration, in a manner that is effective and clear to the international community.

12. It is accordingly submitted that the following amendments to the Convention would render it more effective, without giving any concern for the contracting states that support it:

    12.1. The deletion of the phrase "it may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration" in Article I(3); and

    12.2. Amending the phrase "the public policy of that country" in Article V(2)(b) so that instead reads "international public policy".

13. These issues are discussed below.

THE NEW YORK CONVENTION PROVIDES A VIABLE FRAMEWORK

14. On the premises set out in paragraph 2 above the Convention is, on the whole, successful in providing a viable framework for international commercial arbitration. It currently enjoys the support of 159 states across the globe, and therefore can be said to enjoy broad international support.[6]

15. The Convention also generally provides an effective and efficient means for the recognition and enforcement of arbitral awards. Article II provides for the recognition or written arbitration agreements, which include arbitral clauses in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams. Article II (3) provides that where it is confronted with a matter that is the subject of an arbitration agreement, the court of a contracting state shall at the request of one of the parties refer the parties to arbitration unless it finds that agreement to be null and void, inoperative or incapable of being performed.

16. Article III provides for the enforcement of arbitral awards. It reads as follows:

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3. Article I(3) of the Convention provides:

   "When signing, ratifying or acceding to this Convention, or notifying extension under Article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration." (own emphasis).

4. Article V(2)(b).

5. Kronke (2010) at 32 – 33; Roy (1994) 18 (3) *Fordham International Law Journal* 920 at 925-926.

6. A list of the contracting states under the Convention is available from the website of the United Nations Commission on International Trade Law ("**UNCITRAL**") at the following URL: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html. UNCITRAL has also produced an interactive that demonstrates the broad and global support for the Convention, which is available at the following URL: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status_map.html.

"Each contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

17. This provision has the following effect:

    17.1. Arbitral awards are to be recognised as binding and enforceable within the jurisdictional territory of contracting states, subject to the provisions of the Convention, subject only to the ordinary rules of procedure of that territory; and

    17.2. Arbitral awards to which this Convention applies shall not be treated more onerously than domestic arbitral awards.

18. Article IV sets out the procedure for the recognition and enforcement of arbitral awards. The party seeking the recognition or enforcement of an arbitral award under the convention must produce nothing more than a duly authenticated original award or a duly certified copy of the award, and the original arbitration agreement or a certified copy thereof. If necessary, an official translation of these documents must also be provided.

19. This is not onerous. The successful party to an arbitration is only required to produce proof of the arbitration agreement and of the award. It must follow the same procedure that any other litigant seeking to enforce a domestic award would have to follow and is therefore placed on equal footing with a litigant in a domestic dispute.

20. Article VII(1) of the Convention further ensures the rights of a party seeking the recognition or enforcement of an international arbitral award. It provides that the Convention shall not deprive a party to the arbitration of any right that he or she may have under the treaties or laws of the contracting state. In other words, where the laws or treaties of a contracting confer greater rights on a party than the Convention, then the party may rely on those laws or treaties instead of the Convention.

21. On the whole, this is an effective and simple enforcement mechanism. Nothing onerous is demanded of the successful party, and the Convention ensures that there are no additional obstacles in the path of that party. In essence, a party seeking enforcement under the convention is placed in equal footing to a party seeking to enforce a domestic arbitration. There could be no more effective or efficient mechanism that does not infringe the sovereignty of the contracting states to the Convention.

22. But for Article V (2)(b) of the Convention, the provisos under which enforcement may be resisted do not undermine the purposes of the Convention. Article V(1) provides for five grounds upon which recognition and enforcement may be refused, if proof is furnished by the party seeking to resist the enforcement of the award. These are:

    22.1. The parties to the agreement were under some incapacity in terms of the law applicable to them or the agreement is not valid under the law to which the parties have subjected it;[7]

    22.2. The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case;[8]

    22.3. The award deals with a difference not contemplated by or not falling within the terms of the submission to the arbitration; or contains decisions on matters beyond the scope of the submission to arbitration;[9]

    22.4. The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the

7. Article V(1)(a).
8. Article V(1)(b).
9. Article V(1)(c).

parties, or, absent such agreement, was not in accordance with the law of the country where the arbitration took place;[10] or

22.5. The award was not yet binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.[11]

23. These do not in any way weaken the scope of the Convention. Arbitration is a consensual process and therefore depends on the agreement between the parties being lawful and valid. The scope of an arbitration is limited by the agreement of the parties. The provisions of article V(1) do not stray beyond what would ordinarily be required of a valid arbitration.

24. The same cannot be said about article V(2)(b). This imposes an additional burden on the arbitral proceedings that may or may not have been considered by the parties, and subjects the arbitral proceedings to an additional layer of national law. This is discussed below.

ARTICLE V(2)(B) IMPOSES AN ADDITIONAL AND UNNECESSARY BURDEN

25. Article V(2) reads as follows:

> "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> a. the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> b. the recognition or enforcement of the award would be contrary to the public policy of that country." (emphasis added)

26. For purposes of convenience Article V(2)(b) of the Convention shall be referred to as the "**public policy article**".

27. As was noted above, Article V(2)(b) was included to allay the fears of contracting states that their domestic laws may be overridden by the Convention. It is described as a safety valve allowing states to prevent the irreconcilable intrusion of arbitral awards under the domestic legal system.[12] As shall be explained in detail below, article V(2)(a) sufficiently caters for this purpose.

28. Article V(2)(b) does not merely protect the national laws of a contracting state. It in effect subjects an international arbitration process to the public policy of that enforcing state, notwithstanding the fact that the parties to the arbitration had already chosen the law to which to subject their dispute. This undermines the purposes and goals of the Convention.

The nature of public policy

29. The public policy article may serve not only the international support criterion, but may also serve an important jurisprudential purpose. Domestic courts are the interpreters and enforcers of public policy and should not and do not allow a departure from the requirements of public policy.

30. Under South African law a court must refuse to enforce a contract if doing so would be contrary to public policy. In *Barkhuizen v Napier* the South African Constitutional Court found that public policy within that state must be determined by reference to the values set out in the Constitution of the Republic of South Africa, 1996 (the "**South African Constitution**") and held that "a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable".[13] Importantly, section 8 of the South African Constitution binds the judiciary as well as the other branches of government.[14]

31. Prior to the advent of the South African Constitution the Apellate Division of South Africa held that "our common law does not recognise agreements that are contrary to public policy",[15] and issued the following warning:[16]

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10. Article V(1)(d).
11. Article V(1)(e).
12. Butler & Katerndahl (2018) 7(1) *Indian Journal of Arbitration Law* 104 at 107
13. *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at paragraph 29 ("***Barkhuizen***").
14. Section 8(1) of the South African Constitution provides that "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."
15. *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 7I.
16. *Id* at 8D.

"Agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy, not be enforced."

32. Indubitably the same principle applies in many, if not most, jurisdictions across the globe.[17] The purpose of this is to prevent the judicial authority of a court from being abused and clothing with lawfulness an otherwise unlawful state of affairs. In *Patel v Mirza* the Supreme Court of the United Kingdom held as follows:[18]

"Looking behind the maxims, there are two broad discernible policy reasons for the common law doctrine of illegality as a defence to a civil claim. One is that a person should not be allowed to profit from his own wrongdoing. The other, linked, consideration is that the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand."

33. Public policy is markedly different from legislative provisions. It is developed incrementally by the courts over time and seeks to reflect the legal convictions of society, which evolve over time. In *Central Inland Water* the Supreme Court of India held as follows:[19]

"From the very nature of things, the expressions 'public policy', 'opposed to public policy' or 'contrary to public policy' are incapable of precise definition. Public policy, however, is not the policy of a particular government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well-recognized head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy."

34. By its very nature public policy retains a measure of uncertainty. Because of this courts in various jurisdictions have been cautious in its application. In *Richardson v Mellish* the Court warned that public policy:[20]

"is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."

35. Similarly, and more recently, the South African Supreme Court of Appeal warned that an over-reliance on public policy would result in the law of contract being "subject to gross uncertainty, judicial whim and an absence of integrity between the contracting parties".[21]

36. Public policy has the power to be flexible and adaptive to changing realities, including commercial realities. But parties to a contract depend on the law for certainty – particularly when they reside or operate outside the jurisdiction of a court and are not ordinarily exposed to the development of the public policy within a contracting state.

37. Exacerbating the difficulty of a lack of certainty, the public policy of each sovereign state is markedly different. This is apparent from the following examples:

    37.1. In South Africa all public policy must be seen through the prism of its Constitution and must be developed accordingly.[22] The Constitutional Court has held that even in commercial matters this may be subject to the communal principle of *ubuntu*, which:[23]

    "emphasises the communal nature of society and 'carries in it the ideas of humaneness, social justice and fairness' and envelopes 'the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity'."

    37.2. In the Pacific Island Nations public policy is infused with a recognition of the local customary law of the states' respective

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17. Some examples from other jurisdictions where this principle was upheld include the following: *Central Inland Water Transport Corporation Limited and Another v Brojo Nath Ganguly and Another* 1986 SCR (2) 278, 1986 AIR 1571 ("***Central Inland Water***") (India); *Métis National Council Secretariat Inc. et al. v. Dumont* [2008] MBCA 142 (Canada); *Patel v Mirza* [2016] UKSC 42 (United Kingdom).
18. *Id* at para 99.
19. *Central Inland Water* (above note 17) at paragraph 95.
20. (1824) 2 Bing 229 at 252.
21. *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 (2) SA 314 (SCA) at paragraph 26.
22. *Barkhuizen v Napier* at paragraph 28.
23. *Everfresh Market Viginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012* (1) SA 256 (CC) at paragraph 71.

populations. This may have a bearing on contractual disputes.[24]

37.3. The public policy of some states may be markedly different from others. In Saudi Arabia usury (either in the form of excessive interest or excessive profit) and speculative contracts (including insurance contracts) are contrary to public policy.[25]

38. The inescapable question within the context of international arbitrations is this: from which body of laws does one draw the public policy to be found?

39. The answer given by the Convention, under the public policy article, is from the laws of the contracting state asked to enforce or recognise the arbitration award. This means that an arbitration award must satisfy the domestic public policy of the contracting state at the stage of recognition and enforcement.

40. The problem with this answer is that it ignores the fact that the parties to the arbitration have already chosen a law to govern the merits of their dispute. If the parties have chosen South African law as the law that applies to the determination of that dispute, then the principles of South African public policy must be applied by the arbitral tribunal to that dispute. Parties to an international agreement are free to choose the nationality of that agreement, and therefore the nationality of that dispute. They are given the freedom to choose the public policy that ought to be applied.

41. The effect of the public policy article is to subject the merits of the arbitration to a second set of national laws. If the enforcement of an arbitration award that was decided under South African law is sought in Saudi Arabia, that award must also satisfy the requirements of Saudi Arabian public policy in addition to having satisfied South African public policy. If it cannot do so, it shall not be enforced.

42. The public policy article therefore creates a serious hindrance to the arbitration process. It undermines the finality of the arbitration award and frustrates the parties' agreed choice of law.

43. Whatever gains are achieved by the public policy article in respect of the international support criterion are lost under the effectiveness criterion. One could easily imagine a contracting state "A", whose public policy and laws are markedly different from the legal principles that are applied in most other contracting states, agreeing to sign the Convention only because of the public policy article. When confronted with any application under the Convention, however, the courts of state "A" on virtually every occasion refuse to recognise or enforce an arbitral award because of a conflict with the public policy of state "A". Its signature of the Convention is therefore virtually meaningless: it will never recognise or enforce an arbitral award under the Convention on the basis of public policy.

44. This difficulty has become apparent in India, which has adopted a relatively low threshold for the public policy defence. Enforcement shall not be permitted by the Indian courts when the award is contrary to the fundamental policy of Indian law, the interests of India, justice and morality, or when it is patently illegal.[26]

45. Public policy was defined by the Supreme Court of India as follows:[27]

"It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/ judgment/decision is likely to adversely affect the administration of justice."

46. The court went on to say that an arbitral award could be set aside if it is contrary to the fundamental policy of Indian law, the interest of India, justice or morality, or if it is patently illegal. Furthermore, an award could be set aside if it

24. Butler & Katerndahl (2018) 7(1) *Indian Journal of Arbitration Law* 104 at 111 to 114.
25. Roy (1994) 18 (3) *Fordham International Law Journal* 920 at 947 – 949.
26. Arthur, J (2017) *International Arbitration Discourse and Practices in Asia* at 2.3.6.
27. *Oil & Natural Gas Corp v Western Geco International Ltd* at paragraph 2014 (9) SCC 263 at paragraph 31.

is so unfair or unreasonable that it shocks the conscience of the court.[28]

47. This judgment has been criticised as enabling a court to delve into the merits of an arbitral award and act as a king of appellate court over the award, which is contrary to what is accepted internationally.[29]

48. It is correct that this is the effect of the judgment of the Supreme Court of India. But this falls plainly within the wording of the public policy article. Under the Convention, as it presently reads, the recognition and enforcement of an arbitral award may be refused on the basis of the public policy of India, which is determined by its courts.

49. The public policy clause therefore overlooks the consensual nature of arbitration (which extends to the parties' choice of law) and also ignores the fact that an arbitral award is decided under a foreign law. The purposes of the Convention are defeated by requiring international arbitration awards to comply with the public policy under the parties' choice as well as the public policy that applies in the enforcing court's jurisdiction. It may also open the door for courts to interfere in the merits of the dispute, which have already been decided under arbitration.

The pro-enforcement bias in interpreting the public policy article

50. Attempts have been made to ameliorate the consequences of the public policy clause by ensuring a pro-enforcement bias in the interpretation of the article.

51. The ICCA's Guide to the Interpretation of the 1958 New York Convention promotes a pro-enforcement bias in the interpretation of the Convention. It says the following:[30]

> *"The purpose of the New York Convention is to promote international commerce and the settlement of international disputes through arbitration. It aims at facilitating the recognition and enforcement of foreign arbitral awards and the enforcement of arbitration agreements. Consequently, courts should adopt a pro-enforcement approach when interpreting the Convention."*

52. The ICCA suggests that public policy under the public policy article may refer to either the domestic principles of public policy, or public policy principles based on the international concept of public policy.[31] Relying on the recommendations of the International Law Association, it promotes reliance on the international concept of public policy, which is defined as:[32]

> *"the body of principles and rules recognised by a State, which, by their nature, may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition or enforcement of said award would entail their violation on account either of the procedure to which it was rendered (procedural international public policy) or of its contents (substantive international public policy)."*

53. This includes the following three categories:

    53.1. The fundamental principles of justice or morality that the state wishes to protect even when it is not directly concerned,

    53.2. the rules designed to serve the essential political, social or economic interests of the state, and

    53.3. the duty of the state to respect its obligations towards other states or international organisations.[33]

54. This test has been adopted in a number of jurisdictions. Malaysia, Singapore, Hong Kong, China, and South Korea would only allow a public policy defence where the court's most basic notions of morality are violated.[34]

55. The United States of America also applies this test. In *Parsons* Court of Appeals for the Second Circuit held that "Enforcement of foreign arbitral awards may be denied on [the public policy article] only

28. Id.
29. Kurlekar, A (2015) ONGC v Western GECO – A new impediment in Indian Arbitration, 7 January 2015 http://arbitrationblog.kluwerarbitration.com/2015/01/07/ongc-v-western-geco-a-new-impediment-in-indian-arbitration/ (accessed 1 November 2018).
30. International Council for Commercial Arbitration *ICCA's Guide to the NYC* at 15-16.
31. Id at 106.
32. Id at 107.
33. Id at 108.
34. Arthur, J (2017) *International Arbitration Discourse and Practices in Asi*a at 2.3.2 – 2.3.5.

where enforcement would violate the forum state's most basic notions of morality and justice".[35]

56. In that matter diplomatic ties between the United States and Egypt had been severed after the six day war began in Israel, resulting in a breach of the contract between the parties. The Court held in that matter that the public policy article could not be used to protect concerns of foreign policy or national interests.

57. It is unclear, however, where the line should be drawn between the ordinary domestic public policy of a contracting state and its most basic notions of morality and justice.

58. The definition of public policy promoted by the ICCA and the ILA as set out in paragraphs 52 to 53 is either vague or is not supported by the words used in the Convention.

59. It is not clear or easily ascertainably what the difference is between the ordinary domestic public policy of a contracting state and the provisions set out in paragraphs 53.1 and 53.2 above. In other words, there may be no difference between the narrow and the broad interpretation of public policy, which renders the distinction made by the ILA and promoted by the ICCA meaningless.

60. The examples set out above demonstrate this. It is unclear whether the principle of *ubuntu* in South African law, or *kastom* in the PIC states, or the rules pertaining to usury and speculative agreements in Saudi Arabia, constitute fundamental principles of justice and morality within the contracting state or not.

61. It also cannot be said that these principles are not designed to serve the essential political, social or economic interests of those states. As was noted above, public policy in South Africa is informed by its Constitution. It cannot legitimately depart at all from these principles. The same can be said about kastom in the PIC states.[36] Similarly, it can hardly be said that clear and unequivocal rules under sharia law could be set aside without departing from the political and social interests of Saudi Arabia.

62. On the other hand, to the extent that a contracting state may be considered to have a domestic public policy and an international public policy, then the wording of the Convention leaves no room for doubt: the public policy article provides that it is the public policy of that contracting state (and not an international public policy) that applies.

63. The wording of the article does not only lay the path open for contracting states to apply a domestic public policy. If the article was included to allay fears that the domestic law of contracting states would be overridden, then those states whose fears are allayed should be entitled to apply their domestic law.

64. This article, however, is not necessary to protect the domestic law of contracting states. Their laws receive adequate protection from article V(2)(a), as shall be explained below. There is no sensible reason to protect the public policy (as distinguished from national government policy) of a contracting state that is asked to recognise and enforce an arbitral award that has already been subjected to the public policy of the law chosen by the parties.

65. Despite being a valiant attempt to save this provision, even on the generous interpretation that is encouraged by the ICCA and the ILA, the wording of the public policy article remains problematic. It still undermines the effectiveness of the Convention.

The United Kingdom interpretation

66. In the United Kingdom a more nuanced approach has been developed.[37] Briefly, it requires the court to strike a balance between the interest in finality in arbitration and the need to ensure that the enforcement power of the court is not abused. The mere fact that the matter would have arrived at a different result under English law is not enough.

67. This test shifts the focus from the substantive nature of public policy to the question of whether enforcement of the order is appropriate under the

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35. Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974)

36. Butler & Katerndahl (2018) 7(1) *Indian Journal of Arbitration Law* 104 at 112 – 113.

37. RBRG Trading (UK) Ltd v Sinocore International [2018] EWCA Civ 838 at paragraph 24.

circumstances of the case. Enforcement may be refused, for example, if it is apparent from the face of the award that the contract was made with the intention of violating the law of a foreign friendly state.[38]

68. This test is preferable to the test set out in *Parsons*: the focus is shifted away from substantive questions (morality and justice) and is placed on whether it is appropriate in the circumstances of the matter to enforce the arbitral award. The party seeking to enforce an international award is therefore not required to satisfy the public policy of the enforcing state or to meet the requirements of an additional body of law. It must be determined on questions of whether enforcement is appropriate under the circumstances, with a minimal intrusion by the domestic law of the state.

Toward an international public policy on the enforcement of arbitral awards

69. In discussing these difficulties Roy suggests that one solution may be to eliminate the public policy clause in its entirety, and argues that the remaining six grounds under article V should be sufficient to ensure fairness in arbitral proceedings.[39]

70. This, however, is not a satisfactory solution. There may be compelling reasons why an arbitral award should not be enforced that do not fall within the other grounds listed under Article V of the Convention, for example where the arbitration award that seeks to give effect to a crime, or is specifically designed to flout and undermine the law of a state.

71. It is in the general interest of the global community that international arbitrations are not abused so as to undermine applicable domestic laws or to commit or facilitate criminal conduct. This is particularly so in the modern era where unlawful activity may take any number of insidious forms, and commercial transactions may conceal or support terrorist activity and human trafficking, among many other international crimes.

72. International commerce and trade is dependent on the harmonious relations among nation states and the prevention and combating of criminal conduct, both at an international and at a national level. This is particularly so in the era of advanced communications and globalisation.

73. Seen in this context, a domestic court asked to recognise and enforce an international arbitral award is under a duty to ask whether it is appropriate to grant such an order within the prevailing circumstances before it. In dealing with this question the court should have regard to international principles, and not premise itself on the requirements of its domestic public policy.

74. It is appropriate for courts to apply a kind of international public policy: a set of rules that over time may be developed to set out the circumstances where an arbitration decided under a foreign law may be enforced and where it may not be enforced.

75. It can be said that there is a lack of certainty as to what these principles are, but this is not an insurmountable problem. Over time court decisions taken across the world shall crystallise this international public policy, and in doing so a more comprehensive body of international commercial law shall be developed. The benefits of establishing this body of law far outweigh the initial problem of a lack of certainty that may arise.

76. It appears that the ICCA and the ILA suggest that the public policy article should be read in this manner. But this is undermined by the express wording of the provision: enforcement and recognition must be refused if it is contrary to the public policy of that country.

77. It is submitted that even where a court is required to apply this international public policy over the domestic public policy this is appropriate. There is no reason why a court cannot sit as a domestic forum in domestic matters, and sit as a kind of international forum in international matters, where it is asked to enforce an award that has

38. Id.
39. (1994) 18 (3) *Fordham International Law Journal* 920 at 957.

been decided under a foreign law. It does not have jurisdiction over the merits of the dispute or the nature of the claim: only on the enforcement of the dispute.

78. Accordingly, it is submitted that it is appropriate to amend article V(2)(b) so that it reads "the recognition or enforcement of the award would be contrary to international public policy".

DOMESTIC LAWS ARE ADEQUATELY PROTECTED BY ARTICLE V(2)(A)

79. The proposed amendment to the public policy article means that that provision would no longer allay the fears that the domestic laws of the nation state may be overridden by the Convention.

80. The first answer to this is that an arbitration award under the Convention should be considered similarly to a judgment of a foreign court. International comity and the finality of that judgment would suffer if all the laws and public policy constraints of an enforcing state were applied to a foreign judgment that were brought for the purposes of enforcement.

81. Likewise, for the international arbitration process to be successful, it must be recognised for enforcement without the need to delve into the merits of the dispute or into the public policy requirements of the enforcing state, except where international principles must be applied.

82. The second answer, however, is that article V(2)(a) provides a more effective protection for domestic laws and affords the international community a sense of certainty.

83. Article V(2)(a) of the Convention provides that a court may refuse to recognise or enforce an arbitral award if it finds that the subject matter of the difference is not capable of settlement by arbitration under the law of that country. For convenience this shall be referred to as the "**arbitrability article**". It provides suitable and effective protection for the domestic laws of a state.

84. It is frequently accepted that some disputes are not suitable for arbitration, such as criminal proceedings or family law disputes.[40] Legislation may also provide for matters that fall outside the scope of arbitrability. Under section 2 of the South African Arbitration Act 42 of 1965, for example, matrimonial causes and any matter relating to status are excluded from arbitration.

85. In addition to this, section 7(4) of the South African Promotion of Administrative Justice Act 3 of 2000 provides that administrative matters must be instituted in the High Court or another court having jurisdiction.[41]

86. The effect of this legislative provision is that matters of administrative law, which include the awarding of commercial tenders, is kept outside the scope of arbitration.[42]

87. Where contracting states wish to keep an area of law or a set of concerns outside the realm of international arbitration the appropriate step is likewise to exclude that area of law or concerns from arbitrability by way of legislation.

88. This is far preferable to relying on the public policy article. Contracting states may remove any kind of dispute from the scope of arbitration by legislation, and a clear message is given to the international community as to what is and what is not arbitrable under the laws of that state.

89. This should provide sufficient protection to contracting states across all jurisdictions. It is always open for a state to legislate on what is arbitrable and what is not. It may preserve key legal concerns in this way.

90. This does not provide the generalised protection that is offered by the public policy article. But in light of the uncertain nature of public policy, and the fact that public policy should at any rate be developed incrementally, this limitation is minimal at best.

91. Article V(2)(a) therefore provides sufficient protection to contracting states. It should be

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40. ICCA guide at 63.
41. The provision provides as follows:

    "Until the rules of procedure referred to in subsection (3) come into operation, all proceedings for judicial review under this Act must be instituted in a High Court or another court having jurisdiction."

    The rules of procedure contemplated in subsection (3) have not come into operation.
42. *Airports Company South Africa v ISO Leisure OR Tambo (Pty) Ltd and another* 2011 (4) SA 642 (GSJ).

relied upon and contracting states should be encouraged to make full use of this provision by codifying what is arbitrable and what is not.

THE COMMERCIAL RESERVATION IN ARTICLE I(3) UNDERMINES CERTAINTY

92. Just as the public policy article unnecessarily undermines legal certainty in the international community, the commercial reservation provision contained within article I(3) also acts to frustrate legal certainty. This provision is also unnecessary – the arbitrability clause provides the necessary protection to member states, while article I(3) fails to provide any clear role.

93. Article I(3) provides as follows:

> *"When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration."* *(Own emphasis)*

94. This is another provision that was presumably intended to allay the concerns that arbitral awards could override matters of national public importance. The problem, however, is that it creates uncertainty. When considered in the light of article V(2)(a), it is also an unnecessary provision.

95. The provision does not at first appear to be offensive. Ordinarily arbitrations arise out of commercial matters. Non-commercial matters are very frequently issues that are not arbitrable – for example matrimonial or criminal matters.[43]

96. But the Convention does not give a definition for what a commercial matter is. That is to be determined by reference to the national law of the state asked to recognise or enforce an arbitral award.

97. This provision therefore places an additional hurdle in the path of recognition and enforcement. Where a contracting party under the Convention has made a commercial reservation, one must (on the extant text of the Convention) satisfy the following tests before an arbitral award may be recognised and enforced:

    97.1. The arbitration must pertain to a commercial matter under the national law of the contracting state (article I(3)).

    97.2. The difference decided upon by the arbitral forum must be one that is arbitrable under the national law of that state (article V(2)(a)); and

    97.3. Whether the public policy of the contracting state allows for the recognition and enforcement of the arbitration.

98. Commercial matters may not even be defined under the domestic law, and they may not necessarily correspond to what is arbitrable. Under South African law, for example, the awarding of tenders by an organ of state or a public body is not arbitrable, but is clearly commercial.[44]

99. Kronke notes that the courts within a contracting state also may not maintain a consistent definition of what constitutes a commercial matter.[45] For example, in *Kamani Engineering Corp v Societe de Traction* the High Court of Bombay held that work of a technical or professional nature do not constitute a commercial transaction, because "it is not in any sense participation in profits between the parties".[46] In a later case the High Court of Bombay narrowed the scope even further and held that the relationship must be "a relationship considered commercial under the provisions of a law in force in India", in the absence of which the arbitration award could not be recognised or enforced.[47]

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43. International Council for Commercial Arbitration *ICCA's Guide to the NYC* at 63.
44. *Airports Company South Africa* (note 42 above).
45. Kronke (2010) at 33.
46. *Kamani Engineering Corporation v Societe De Traction* AIR 1965 Bom 114 at paragraph 19.

100. The High Court of Gujarat, however, took a different approach and interpreted the word "commercial" broadly. It held that that the word was:[48]

> *"of the largest import and takes in its sweep all the business and trade transactions in any of their forms including the transportation, purchase, sale and exchange of commodities between the citizens of different countries."*

101. In the case of *Kamani Engineering Corp* <full name> the High Court of Bombay held that technical know-how contracts and turnkey contracts were not considered commercial agreements under the laws of India. Later, in *Indian Organic Chemcial Ltd v Chemtex Fibers Inc* it gave an even more restrictive interpretation of the commercial reservation. It required an express provision in Indian law (either in statute or in any other operative legal principle) declaring the subject matter of the arbitration to be commercial.

102. By contrast, in *Lief* the High Court of Gujarat adopted a broad interpretation of the commercial reservation. It held that all business and trade transactions in any of their forms amounted to a commercial matter.

103. Graciously, the matter was settled in 1994 when the Supreme Court of India adopted the broader interpretation of the word "commercial".[49] It took into account the importance of arbitration to international trade as a speedy method of dispute resolution and held that "the expression 'commercial' should therefore be construed broadly having regard to the manifold activities which are an integral part of international trade today."[50]

104. The second reservation under article I(3) therefore serves to frustrate the purposes of the Convention and may be interpreted in a narrow manner, which could prevent the enforcement or recognition of most international arbitrations.

105. On the other hand, it is unclear whether this reservation even provides effective protection to domestic policy laws.

106. is easier and more effective for a contracting state to pass legislation declaring that an area of law be excluded from the ambit of arbitration. This gives the contracting state the power to exclude any field or area of law from arbitration – including matters that are clearly commercial. By directing contracting states to expressly set out what differences may and may not be resolved by arbitration a greater level of certainty is again created.

107. The second reservation in article I(3) is therefore unnecessary and creates confusion. It should be eliminated.

CONCLUSION

108. The Convention is a powerful and essential tool in international arbitration. It ensures that international arbitral awards are placed on equal procedural footing to domestic awards. It simplifies the task of seeking the permission of a court to enforce an international award. The Convention also enjoys broad support across the globe.

109. That said, the public policy article and the second reservation under article I(3) undermine the effectiveness of the Convention. They render an international arbitration subject to the scrutiny of domestic laws. This can make enforcement difficult, or it may require the arbitration award subject to an additional body of law.

110. These provisions are not necessary. Better protection is afforded to the domestic laws of a state by article V(2)(a), which enables a contracting state to legislate laws that limit the arbitrability of certain matters of law.

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47. *Indian Organic Chemicals Ltd v Chemtex Fibres Inc* AIR 1978 Bom 106 at paragraph 43.
48. *Union of India and another v Lief Hoegh & Co* AIR 1983 Guj. 34 at paragraph 6.
49. *RM Investment and Trading Co Pty Ltd v Boeing* Co 1994 AIR 1136.
50. Id at paragraph 12.

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Richardson v Mellish (1824) 2 Bing 229 at 252.

United States of America

Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974)

Julia Le Roux

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NEW YORK CONVENTION AFTER 60 YEARS: PROBLEMS AND POSSIBLE SOLUTIONS

By Julia Le Roux

I. THE NEW YORK CONVENTION AND ITS SUCCESS

Along with the development of international trade and commerce, arbitration has been widely accepted as an effective way of dispute resolution. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention"), among other factors, played a significant role in this process. The New York Convention, as a treaty, was entered into by governments to regulate recognition and enforcement of arbitral awards granted in foreign states in their respective local courts. It facilitates the recognition and enforcement of foreign arbitral awards and the enforcement of arbitration agreements. Courts are required to adopt a pro-enforcement approach when interpreting the Convention. Though Article V sets out certain grounds in relation to when enforcement may be refused, they are required to be construed narrowly. The Convention has not only facilitated the enforcement of arbitral award in the world, but also contributed to the development of domestic arbitration law. Contracting states drafted new laws or amended the existing laws in order to give effect to their adoption of the New York Convention. The development of the domestic arbitration law further popularizes the practice of arbitration. It is now common practice that most of the international commercial contracts contain a dispute resolution clause, where arbitration is elected as the means. One can say that the New York Convention has become a corner stone for the rapid development of international commercial arbitration, because it provides a framework of convenience and certainty.

As the late Professor Pieter Sanders said in April 2011, when he was the last surviving participant of the New York Convention, "the 1958 New York Convention is the most successful, multilateral instrument in the field of international trade law. It is the centrepiece in the mosaic of treaties on arbitration laws that ensure acceptance of arbitral awards in arbitration agreements. Courts around the world have been applying and interpreting the Convention for over 50 years in an increasing unified and harmonized fashion."[1]

This year marks the 60th anniversary of the New York Convention. As of today, there are 159 contracting states to the Convention, more than 2500 cases reported from around 70 countries in terms of the Convention, most in favour of the enforcement. "This means that in most jurisdictions in the world, courts apply the Convention provisions and recognize the awards made abroad or made following the application of a foreign law. Such quasi-universal acceptance of the recognition and enforcement process brings legal certainty to the business operations worldwide. It is also a demonstration of a strong commitment to the rule of law. Thanks to the New York Convention, arbitration has become the primary method for solving disputes in international trade, and the commonly used method for countless disputes."[2]

II. THE CHALLENGES THAT THE NEW YORK CONVENTION IS FACING

However, despite its successful history and the remaining glory, the New York Convention also has flaws. Some flaws have been the subject of debates for years, and have been dealt with to a certain extent, others are emerging. For instance, there have been many debates about Article II(1) of the Convention, in which it states that the arbitration agreement should be "in writing". The Convention itself does not explain what qualifies as "in writing", and the development of the modern electronic communication requests that electronic means of agreement be accepted. In response to the need of change and certainty, Article VII of the UNCITRAL Model Law provided a more detailed and extensive explanation of the definition and form of arbitration agreement.[3]

1. *Foreword by Professor Pieter Sanders as Honorary General Editor*, ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges
2. Mr. Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, in his speech during the New York Convention 60th Anniversary Conference held in New York on 28 June 2018: *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"): a beacon for international trade*

Like any new creature, the birth of New York Convention has its unique historical background and context. In the past 60 years, the whole world has undergone tremendous changes, especially in the trade and economic sectors. The increasing trade volume, the revolutionary ways of communication and other changes brought challenges that could not have been foreseen 60 years ago. The growing amount of arbitration and enforcement cases are testing and trying the application of the Convention, which unsurprisingly demonstrated some flaws and weaknesses that the drafters did not think of. As an impact of the New York Convention, the arbitration legislation of the contracting states developed rapidly since the adoption of the Convention, and while countries with more advanced economy and arbitration practice have embarked on the way of modernization of arbitration legislation, national domestic arbitration legislations are causing counter-acting impact to the Convention.

On the other hand, there are matters that are not regulated by the Convention and thus only regulated by national laws, which include the competent court(s) to be seized with the application, the production of evidence, the limitation periods; conservatory measures; whether the grant or denial of recognition and enforcement is subject to any appeal or recourse; criteria for execution against assets; the extent to which the process of recognition and enforcement is confidential, etc.[4] Courts of different jurisdictions are taking various approaches and adopting different attitude in dealing with these issues, as well as in interpreting provisions of the Convention. A few of the above issues and the problem caused by these issues will be discussed in more details in the following paragraphs.

1. Reliance on the national procedural rules for the enforcement of foreign awards.

Article III of the Convention provides that "each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, ,…". This means that the national courts shall recognize and enforce foreign arbitral awards in terms of their own procedural rules. This can cause problems because national procedural rules vary from one state to another, which could undermine the effectiveness of arbitration.

The problems related to the provision of Article III are two folded. On the one hand, the complication relates to the legal system and the background of the state where the award is to be enforced, as the mandatory procedural rules are determined by the legal system; on the other hand, there is no uniformed interpretation of the New York Convention's provisions among national courts.

For instance, although the New York Convention sets no time limit for the enforcement of foreign arbitral award, the Prescription Act No. 68 of 1969 of South Africa provides that a judgment debt and a few other kinds of debt prescribe after 30 years, while any other debt prescribe after 3 years. Is the Convention Award a judgment debt? The answer is probably no. So, if the Convention Award holder does not bring the application for enforcement to court within three years upon receiving the arbitral award, can prescription be used as a defence to resist enforcement? The answer is unknown as there is no precedence yet, but the possibility exists that prescription can be raised as a defence. Meanwhile, the Civil Procedure Law of the People's Republic of China made it clear that the prescription for enforcement is 2 years.

The duration and process of recognition and enforcement in different jurisdiction can also cause frustration to the party seeking recognition and enforcement, which in some cases can undermine the effectiveness and efficiency inherited in the mechanism of arbitration. In *Paloma Company Limited v. Capxon Electronic Industrial Company Limited [2018] HKCFI 1147*[5], the applicant, a Japanese entity, received the arbitral award in its favour in Japan in August 2014 against the respondent, a subsidiary of a Hong Kong listed company with registered address in Taiwan. Subsequent to the Award, the respondent sought to have the Award set aside in a number of courts in Japan between August 2014 and May 2017. Thereafter the applicant attempted to enforce the award in both Hong Kong and Taiwan. It then waited another ten months before the respondent's attempt to resist the recognition and enforcement of the Award was rejected by the court in Taiwan. The respondent then filed a

3. Article 7 of 1985 UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006
4. ICCA Guide to the New York Convention, p69

setting aside summons in Hong Kong. When the case was published in May 2018, the setting aside summons was dismissed. Therefore, almost four years after the arbitral award was granted, the applicant is still in the process of seeking enforcement. Unfortunately, this is not an example of an extreme scenario, but one of common practice. There are many cases that take much longer to enforce the arbitral award. Sometimes enforcement becomes a delayed justice thus no justice when it eventually happens, as the enforceable assets have been disposed of during the prolonged process.

Another typical example of problematic court procedure is security for costs in the enforcement proceedings. In South African courts, for instance, a foreign applicant who seeks to make an arbitral award an order of court may subject to security for costs, in terms of Rule 47(1) of the Uniform Rules of Court, simply because it is a foreign party. It could mean that although a foreign party won an enforceable binding award in an international arbitration against a South African party, and although the South African party did not institute any action in the lex arbitri to set the award aside, when the winning party seeks to enforce the award in South Africa, it might have to tender security for costs if the South African party so requests. It creates an awkward situation when a winning party seeking enforcement not only has to incur legal costs for its enforcement application, but also has to put a substantial amount of money aside and make provisions for the losing party's legal costs, in case the enforcement application is rejected and the court makes a cost order against it. Although the party seeking enforcement can oppose the request for security for costs, it is in the court's discretion whether the security should be tendered. There is no precedence in South Africa in this regard, however, in the case of Diag Human SE v Czech Republic [2013] EWHC 3190 (Comm), the Commercial Court of England confirmed that it has jurisdiction to grant security for costs against claimants seeking to enforce arbitration awards in the English court under the New York Convention. Should such a case come before the South African court, it may use the English case law for reference. On the other hand, it also shows that issues such as security for costs are not unique. The winning party is thus facing a dilemma: commencing an interlocutory application in the process of enforcement application, or tendering security for costs and hoping for a speedy conclusion of the enforcement application. Even if the foreign party does not dispute the security but only the amount of the security, it would still find itself in a queue, waiting to appear before the Taxing Master, as the case in South African High Court, to argue the amount to be tendered.

2. Inconsistent interpretation among national courts.

Another problem in relation to national courts is the inconsistent interpretation of the Articles of the Convention. As the Convention does not provide definitions to terms, national courts have to interpret the Articles according to their own understanding and legal precedence. Besides uncertainty derived from the requirement of "in writing", the meaning of a few other terms and expressions has been debated. These include "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." in Article I(1); "incapacity" in Article V(1)(a); "proper notice" and "or was otherwise unable to present his case" in Article V(1)(b); "The award has not yet become binding on the parties" in Article V(1)(e); "The subject matter of the difference is not capable of settlement by arbitration…" of Article V(2)(a) and the "public policy" in Article V(2)(b), etc.

Take "arbitrability" and "public policy" as examples. The Subcommittee on Recognition and Enforcement of Arbitral Awards of the International Bar Association conducted a comparable study on "public policy" and on "non-arbitrability" as a defence to the recognition and enforcement of arbitral awards under the New York Convention in 2015 and 2016 respectively. In both reports, various jurisdictions participated in the research by providing their court practices and interpretation of "public policy" and "arbitrability" referred to in the New York Convention. The individual reports, which are available on the International Bar Association website, show clearly that each national court has its own interpretation and methodology, some follow the national law, if the national law provides an explicit definition or rule on what types of issues are not arbitrable, or against public policy, some follow a case by case approach. Courts in different jurisdictions may also interpret the same award differently. Thus, an award might be enforceable in one jurisdiction, but not enforceable in another. This difference has

5. http://newyorkconvention1958.org/index.php?lvl=notice_display&id=5045&opac_view=2

caused the enforcement to be more difficult in some jurisdiction than the other. For instance, in India, the court will refuse the enforcement of the award if the nature of a dispute is such that it cannot be settled under arbitration, either because the subject matter is not capable of being settled under different laws which are currently in force in different countries for the time being, or, the subject matter is not capable of being enforced under the law currently in force in India. The scope of "not capable of being settled under different laws which are currently in force in different countries for the time being" is so wide that the enforcing party is facing a tremendous challenge of avoiding any possibility of un-arbitrability.

3. Confidentiality

One of the major features of commercial arbitration in contrast to court litigation is confidentiality. Parities choose arbitration partly because the hearing is private and confidential, while litigation is in open court. However, at the enforcement stage, it has to be dealt with in the open court. The award becomes part of court documents that can be retrieved publicly. During the proceeding of enforcement, the subject matter and the outcome of an arbitration will be discussed, which will totally defeat the purpose of privacy and confidentiality.

III. POSSIBLE WAYS OF IMPROVEMENT

There have been discussions in regard to amendment to the New York Convention. At the 50th Anniversary of the Convention, Professor Albert van den Berg launched the Miami Draft Convention, a hypothetical "new" New York Convention, in which he made an article by article analysis and amendment. As he states again during his lecture commemorating the 60th anniversary of the New York Convention, the effectiveness of the Convention is in danger because of two reasons: the scheme of the Convention no longer corresponds to the needs of the global community; and misguided judicial interpretation has precipitated the text beyond recognition.[6]

Although a major amendment may be a bit far-fetched and difficult to achieve, certain issues have to be addressed, better sooner than later. A few suggestions are discussed as follows:

1. The Convention can provide that the member states should designate specific courts for recognition and enforcement of arbitration agreement and arbitral award. Such courts shall operate under procedural rules in terms of the national legal system, but customized to suit international arbitration. This can not only reduce the duration of an enforcement application thus improve efficiency, but also avoid encumbered procedures such as security for costs. Procedures in such court can also provide for the required privacy and confidentiality, for instance, permission of submitting redacted award.

2. The Convention can provide for a period for parties to bring an application to set the award aside. That is to say, if the enforcement application is brought after the expiry of the period to set aside, and there is no proof that the award is under a proceeding of application to set aside, the party opposing the enforcement cannot use set aside proceeding as a defence to stop the enforcement proceeding.

3. The Convention should give some explanation and provide definition to key words such as "commercial matters", "arbitrability" and "public policy". If the public policy is in terms of the international law, instead of national law, there will be less confusion.

IV. CONCLUSION

Reflecting the history and development of the New York Convention, we must acknowledge its success and positive role, but at the same time recognize its limitation and flaws. The modernization of national laws has made it necessary to revisit the New York Convention by certain amendment in order to maintain its effectiveness in the international arbitration.

6. https://www.law.miami.edu/news/2018/april/albert-jan-van-den-berg-reflects-60-years-ny-convention-successes-and-shortcomings

CONTRACTING STATES
OF THE NEW YORK CONVENTION

Afghanistan
Albania
Algeria
Andorra
Angola
Antigua and Barbuda
Argentina
Armenia
Australia
Austria
Azerbaijan
Bahamas
Bahrain
Bangladesh
Barbados
Belarus
Belgium
Benin
Bhutan
Bolivia
Bosnia & Herzegovina
Botswana
Brazil
Brunei Darussalam
Bulgaria
Burkina Faso
Burundi
Cabo Verde
Cambodia
Cameroon
Canada
Central African Republic
Chile
China
Colombia
Comoros
Cook Islands
Costa Rica
Côte d'Ivoire
Croatia
Cuba
Cyprus
Czech Republic
Democratic Republic of the Congo
Denmark
Djibouti
Dominica
Dominican Republic
Ecuador
Egypt
El Salvador
Estonia
Fiji
Finland

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List of contracting States taken from http://www.newyorkconvention.org/list+of+contracting+states

Adv. Kgomotso Mthethwa

Adv. Mthethwa completed her LLB degree in 2016 at the University of Limpopo and was admitted as an Advocate of the High Court of South Africa in June 2017. She is a member of the Pitje Group of Advocates in Johannesburg and completed AFSA's Advanced Course in Alternative Dispute Resolution, offered under the aegis of the University of Pretoria, 2018. Her fields of expertise include corporate commercial law, tax law, intellectual property law, construction law, labour law, medical negligence and personal injury. She also has a particular interest in international arbitration.

THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

By Adv Kgomotso Mthethwa

1. INTRODUCTION

- The New York Convention ("The Convention"), is one of the key instruments in international commercial arbitration. The Convention applies to the recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration.
- The Convention has established and guaranteed the integrity of international commercial arbitration.
- The global reach of the Convention is impressive. The tally of signatory States now stands at 159 (with Sudan having deposited its instruments of accession on 26th March this year). Herbert Smith Freehills is working with Sierra Leone on its accession, and other States are looking to sign up: the "160th" state is anticipated this year. Out of a total of 195 countries in the world, 80% are contracting States.
- The purpose of this assignment is to critically discuss the viable framework for international commercial arbitration applicable to the Convention. In turn, having to answer questions pertaining to the flaws of the Convention and how they might be corrected. Lastly, to suggest what changes I would make if I had to update the New York Convention.

2. DOES THE NEW YORK CONVENTION PROVIDE A VIABLE FRAMEWORK FOR INTERNATIONAL COMMERCIAL ARBITRATION?

- The Convention's principal aim is that foreign and non-domestic arbitral awards should not be discriminated against by courts asked to enforce them. It obliges Contracting States to ensure such awards are recognised and generally capable of enforcement in their jurisdiction in the same way as domestic awards.
- A second aim of the Convention is to require courts of Contracting States to uphold valid arbitration agreements and stay court proceedings in respect of matters which the parties have agreed should be resolved by arbitration.
- In short, by signing up to the Convention, a State agrees that its courts will respect and enforce parties' agreements to arbitrate, and to recognise and enforce any resulting arbitral award in its jurisdiction subject to only very limited grounds for refusal.
- Both limbs of the Convention are critical factors in the growth and popularity of arbitration across the world in the last 60 years. Privacy, the ability to choose an arbitral tribunal and neutrality are also considered valuable aspects of the arbitral process.
- However, the knowledge that the parties' agreement will be upheld and any resulting award will be enforced across 80% of the countries in the world is fundamental. Without these features, it is doubtful whether arbitration would have become the preferred method of cross-border dispute resolution.
- The knowledge that an arbitral award can be enforced by the coercive powers of the courts in countries around the world also encourages voluntary compliance.
- Of the approximately 5000 new arbitration matters being commenced each year, 25% of cases are settled before they get to an award, 49% of the awards are voluntarily complied with, and only 11% of those awards even get to the stage of recognition and enforcement[1]. This is down to the New York Convention.

1. QMUL Study 2008. Even though the report dates from 2008, subsequent years have not revealed any major changes.

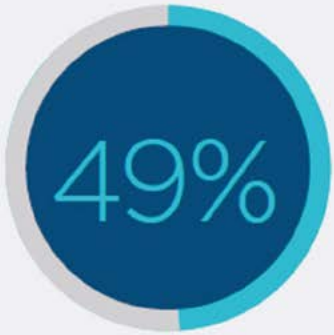
The New York Convention in numbers

159 Signatory states:

80% of the countries in the world

According to the QMUL Study 2008:

25% of arbitrations are settled before the tribunal delivers an award



49% of awards are voluntarily complied with

11% go to the stage of recognition and enforcement

The same study recognised that:

"overall, 92% of the arbitration disputes are successfully resolved at some stage through the arbitration proceedings."

New York Convention FDI growth

- The Convention has an impact on the attractiveness of a country for foreign investment and on its further prosperity and growth.
- International commercial arbitration provides a way in which international parties can agree to enter into complex and highly valuable contractual arrangements, with the certainty that, in the event of a dispute, there will be a predictable process and an internationally enforceable outcome. Therefore, with that being said, the Convention does provide a viable framework for international commercial arbitration.
- Fundamentally, the Convention supports multilateralism and contributes to it by creating a business environment in which people can trust each other.
- This is not to be assumed in the current global environment when multilateralism is under threat. The 60th anniversary is an opportunity to celebrate what has been achieved and focus on the importance of global cooperation regarding international commercial arbitration.

3. WHAT ARE ITS FLAWS AND HOW MIGHT THEY BE CORRECTED?

- The New York Convention has shown increasing signs of wear and tear over the years, and I think we are about to reach a point where it will be necessary to begin a dialogue on revising and revamping the Convention to make it more accessible for end-users (parties, arbitrators, institutions, judges and legislatures).
- The point is not that the majority of awards are enforced without controversy or issue. The point is that the arbitration community should not be complacent or satisfied with a Convention which is 60 years old and is beginning to show "cracks."
- In order for international commercial arbitration to progress further along the path of development, it is necessary to make sure its pillar instruments are in sync with modern perspectives and prevailing judicial interpretations in international arbitration. Let us not forget that the 1958 New York Convention came to be in part due to the indefatigable efforts of its drafters to replace the 1927 Geneva Convention that was in existence for some 30 years only.
- The obligations the New York Convention places upon the courts are extraordinary. In almost every case in which the court is requested to enforce an award, the party against whom enforcement is sought is local, while the party seeking enforcement is a foreigner. It is understandable that many judges in the local courts, who might rarely see a foreign arbitral award, do not appreciate the value of enriching the foreign party at the expense of the local party just because one or three private persons sitting as an arbitral tribunal in another country so decided. They may not see or care that the Convention permits parties from their country to have awards in their favor enforced in other Convention countries.
- To overcome the problem, many Sates may provide that Convention awards are to be enforced in higher level courts that are more likely to be free from local favoritism and to have a broader view of the policy behind their country's adoption of the Convention.[2]
- There is considerable disquiet around loss of sovereignty - that a country's courts are bound to respond in a particular way to party agreement, even where that agreement results in the resolution of disputes relating to that country's natural resources outside its jurisdiction. There are also financial implications involved, as the costs of international arbitration are typically significantly higher than the costs of litigation in courts. Further, a country considering accession will need to introduce implementing legislation and may need to train its judiciary as well as its legal practitioners.
- There are growing concerns about the future of the Convention, noting that the rate of successful enforcement is in decline as domestic courts become more sceptical of the work product of arbitrators and, in effect, more anti-arbitration. I would caution against the courts' increasingly "liberal" attitudes towards the text, which has resulted on occasion in the interpretation and the application of the text beyond recognition of the text itself.
- The public policy exception referred to in Article V (2) of the New York Convention on permitted grounds against the denial of enforcement of awards, needs to be clarified to mean "international public policy." It is to this extent that the Convention is flawed, which reflects the narrower category of "international public policy" developed by the courts

2. For example, in Egypt in regard to all matters having to do with international commercial arbitration, whether conducted in Egypt or abroad, jurisdiction lies with the Cairo Court of Appeal…Law Concerning Arbitration in Civil and Commercial Matters, Article 9. See also Article 56.

of several countries with respect to the Convention. Previously, some national courts had interpreted "public policy" as including the domestic public policy of the country in which the award was sought to be enforced. The standard of "international" public policy would elevate the debate to the right level playing field.

4. IF YOU WERE TO UPDATE THE NEW YORK CONVENTION, WHAT CHANGES WOULD YOU MAKE?

- Whilst the Convention is upheld as the "cornerstone" of arbitration, there have been challenges. I argue that it should be revised in order to remain relevant and suitable for the years to come.
- Article 1 of the Convention (Field of Application) states that the Convention applies to awards made in the territory of a state other than the state in which enforcement is sought. The test is purely territorial, and, is incomplete because the Convention does not apply in the territory of state where award is made.
- The interpretation by domestic courts of the grounds for refusing enforcement can also be criticised, including with regard to the scope of interpretation of Article V(2)(b) (the "public policy exception").
- Further, the permissive interpretation which has been placed by some domestic courts on the word "may" in Article V (1). Such an interpretation introduces a discretion on the enforcing court as to whether to refuse recognition and enforcement on the grounds listed in Article V. A further example of judicial analysis said to justify amendments to the Convention concerns interpretation of Article V (1) (e), most recently by the US and Dutch courts.
- Against the plain meaning of the text, Article V(1) (e) (which concerns an award which has not yet become binding on the parties, or has been set aside or suspended by the courts of the seat), has been interpreted to mean that a judgment setting aside an award must be capable of being recognised in the courts of the country where enforcement is sought before the set aside will be considered valid. In so doing, these courts have relied on their own domestic approach to enforcement.
- The divergent approaches to the recognition and enforcement of awards which have been set aside[3], undermine arbitration's promise of finality and predictability. Other questions arise around the lack of consistency on the process for enforcement globally.
- A list of criteria defining the arbitration agreements falling under the Convention, and making clear that the Convention applies to "international" awards, irrespective of the place where the award was rendered.
- Abolishing the requirement that the arbitration agreement have the written form.
- A list of circumstances under which the court shall *not* refer the dispute to arbitration.
- A provision making the grounds for refusal of enforcement mandatory in nature, by substituting "*may*" for "*shall*;"
- The denial of enforcement of an award solely in "*manifest cases*".
- The denial of enforcement of an award annulled in the country where made on a limited number of grounds only.
- The modification of the public policy ground to deny the enforcement of an award to refer to "international" public policy and the violation thereof.
- I would insert a provision requiring courts to "act expeditiously on a request for enforcement of an arbitral award." because in a number of Contracting States, the procedure for the enforcement of Convention awards is unacceptably slow. This may be an inherent aspect of a country's judicial system.

5. CONCLUSION

In light of the above discussion, the will to revise the Convention has to start with an open dialogue within the arbitration community around the world. If and when sufficient consensus builds among practitioners and arbitrators that the need for revision exists, I believe the political will of States to revamp the Convention will be there to meet this need.

3. Examples include the Dallah and Hilmarton cases

CONTRACTING STATES
OF THE NEW YORK CONVENTION

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France
Gabon
Georgia
Germany
Ghana
Greece
Guatemala
Guinea
Guyana
Haiti
Holy See
Honduras
Hungary
Iceland
India
Indonesia
Iran
Ireland
Israel
Italy
Jamaica
Japan
Jordan
Kazakhstan
Kenya
Kuwait
Kyrgyzstan
Lao
Latvia
Lebanon
Lesotho
Liberia
Liechtenstein
Lithuania
Luxembourg
Madagascar
Malaysia
Maldives
Mali
Malta
Marshall Islands
Mauritania
Mauritius
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Myanmar
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Shane Voigt

Shane is a partner at the international firm of Pinsent Masons LLP which specialises in infrastructure, construction and energy disputes. Shane is a specialist in construction and engineering law, with and emphasis on alternative dispute resolution activities and litigation. He is consistently ranked in Chambers & Partners for his expertise in construction and engineering law in the fields of dispute avoidance and the various modalities of dispute resolution. Chambers records that "Clients appreciate Shane Voigt's ability to see through things and devise strategies to go forward." He has extensive experience of handling both domestic and cross-border disputes, including extension of time cases and claims for delay."

Shane is knowledgeable about the China-Africa (CAJAC) dispute resolution mechanism, is a member of the Arbitration Foundation of Southern Africa ("AFSA") Management Committee and a member of the executive committee for each of AFSA's newly constituted International Arbitration Division, as well as AFSA's newly constituted Construction Division.

INTERNATIONAL ARBITRATION – NEW YORK CONVENTION – 60TH ANNIVERSARY

By Shane Voigt

1. INTRODUCTION / EXECUTIVE SUMMARY

1.1. It has only sixteen Articles but the importance of the New York Convention[1] (the "**Convention**") cannot be understated. It has been described as "*one of the cornerstones of international arbitration*" and is often cited as the reason why international arbitration is the preferred method for the resolution of cross border disputes.[2]

1.2. On its 60th anniversary of the Convention, the task is to consider the background, functioning and effectiveness of its operation and whether there is a need and desire for revision.

2. BACKGROUND – THE NEW YORK CONVENTION

2.1. Originally most arbitrations were held on an *ad hoc* basis. There were no arbitration institutes and no national laws. The lack of international regulation of arbitration, insofar as an arbitration even occurred, meant that each national court would review arbitration awards, often taking into account its own national and political context. A question is: Has this changed that much under the Convention? With poetically-licenced interpretations of the Convention, cynics may say that the Convention is a façade and that nothing has, in fact, changed.

2.2. In 1919, the International Chamber of Commerce (the "**ICC**") was founded as a body that was and remains the voice of the business community. The initiative for the Convention came from the ICC as a result of dissatisfaction with the Geneva Protocol of 1923[3] and the Geneva Convention of 1927.[4] The ICC was the driving force behind the drafting committee of the Convention and its initiative was taken over by the United Nations Economic and Social Council, which produced an amended draft convention in 1955. That draft was discussed during a conference at the United Nations Headquarters in May-June 1958, which led to the establishment of the Convention.[5]

Geneva Protocol of 1923 and Geneva Convention of 1927

2.3. The creation of various international conventions has been of critical importance in developing a universal system that governs the international enforcement of arbitration agreements and arbitral awards[6] and, thereby, facilitates both a degree of predictability as well as facilitating cross-border commerce. It is generally accepted that the first genuinely international convention of this type was the Geneva Protocol of 1923, which was followed by the Geneva Convention of 1927.

2.4. The objectives of the Geneva Protocol of 1923 were to ensure that: (i) arbitration clauses were enforceable internationally; and (ii) arbitration awards would be enforced in the states in which they were made.[7]

2.5. The Geneva Convention of 1927 sought to increase the scope of the Geneva Protocol by providing for the recognition and enforcement of Protocol awards made within the territory of any of the contracting states (i.e. it was no longer the case that awards would only be recognised and enforced in the states in which the award was made).[8]

2.6. While this was a welcome development, it led to the problem of the so called "*double exequatur*" where for a foreign award to be enforced in one

1. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)
2. Redfern and Hunter, *International Arbitration* (6th edn, OUP 2015), para 1.211
3. Geneva Protocol on Arbitration Clauses of 1923
4. Geneva Convention on the Execution of Foreign Arbitral Awards of 1927
5. http://www.newyorkconvention.org/travaux+preparatoires/history+1923+-+1958
6. Redfern (n 2) paras 1.206 – 1.207
7. Redfern (n 2) paras 1.208
8. Redfern (n 2) paras 1.210

jurisdiction it was necessary to demonstrate that the award had become final in the country where it was rendered. This often required the successful party to seek some form of declaration from the court in the country where the award was made (the first exequatur) confirming that the award was enforceable in that country before it could proceed to enforce the award in the courts of the place of enforcement (the second exequatur). During the review of the award, the losing party would often use the opportunity to challenge the arbitral tribunal's findings and the procedure according to which the arbitration was conducted.[9]

Article I – the recognition and enforcement of foreign arbitral awards

2.7. The Convention replaced the Geneva Protocol of 1923 and the Geneva Convention of 1927 some 25 years on.[10] It resolves to provide a more effective system of recognition and enforcement of arbitral awards by starting with the assumption that an award is automatically enforceable and there is no need to prove the validity of the award.

2.8. In the title of the Convention, it refers to the recognition and enforcement of foreign awards.

2.9. Accordingly, Article 1 defines the scope of the Convention by way of reference to these two concepts, namely "*recognition*" and "*enforcement*" of arbitral awards. But it purports, cumbersomely, to do more; it attempts to also identify what constitutes a 'foreign' award by way of a negative, that is, an "*arbitral award[s] not considered as domestic awards…*"

2.10. In fact, Article 1 contains 2 definitions of a "*foreign award*".

2.10.1. The first is more fully recorded in paragraph numbered "3", that is that a foreign award is an award "*made only in a territory of another Contracting State*."; and

2.10.2. the second that it is a 'non-domestic' award

2.11. The second definition is broader than the first (i.e. notionally encapsulates an award made in *any* other territory and, therefore, includes a non-Contracting State), however, it is considered to be incomplete[11] as it excludes the state in which the award was made. What is the consequence? Well one is that two separate regimes potentially apply, namely, that the Convention or that of the local arbitration legislation (if any), depending upon where enforcement is sought. So much for predictability!

2.12. In considering the background to the insertion of the 'non-domestic' definition provided by Albert Jan van den Berg[12], he advises that it was inserted as a compromise between views expressed by certain European countries which were being advised by academics who, in his view, had taken party autonomy to the extreme and believed that parties should be able to arbitrate in one country under the laws of another.[13] This would have been adequately catered for in practice by way of the agreement between the parties acknowledging the differentiation between the place of arbitration in the legal and physical sense. It was nonetheless inserted. It is submitted that the treaty-nature of the Convention, and any contemplated replacement of it, and examples of compromise as just indicated, sound a warning-bell in regards to the formulation of a more concise replacement of the Convention… "*too many cooks spoil the broth*" being another bell that is rung when contemplating this.

2.13. By virtue of the first definition (i.e. the Convention applies to an award made in the territory of another Contracting Party), the second definition would seem to be only relevant to an award made in the country where enforcement of it is being sought.

2.14. Unlike the first definition, however, the second definition appears to be discretionary – this can be inferred from the word "*considered*" as non-domestic. Thus, in determining whether the Convention covers an award, a court is not compelled to consider an award as 'non-domestic' merely because it was made in another jurisdiction.

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9. Redfern (n 2) para 1.210
10. Article VII(2) of the Convention
11. Albert Jan van den Berg, White & Case/ Carolyn Lamm International Arbitration lecture: "Reflections on the 60th Anniversary of the 1958 New York Convention on the Recognition and Enforcement of Foreign Awards" 8 March 2018
12. 08 March 2018 "Reflections on the 60th Anniversary of the 1958 New York Convention on the Recognition and Enforcement of Foreign Awards" lecture
13. As consequence of this compromised late addition, says Jan van den Berg, the provision of Article V had to be amended by way of the insertion of the words "*under the law of which*" when considering the non-binding nature of an award where the recognition and enforceability of it was being challenged

2.15. Furthermore, what is an "*arbitration award*" that is referred to in Article I? It is not defined. This leaves the definition of the scope of the Convention in the hands of the various states where enforcement is being sought. There is no solace in this regard to be found, for example, in South Africa's domestic Arbitration Act[14]. Whilst admirably attempting to be a balancing act between state-sovereignty and prescribing a basis for uniformity, the Convention fails to provide necessary definitions that would facilitate the interpretation and uniform application of its provisions and, therefore, arguably hangs itself by the very rope on which the balancing act was to take place. Such omissions, and omissions in, for example, ensuring uniformity in meaning in the usage of terms in non-English versions of the Convention that have been published give homage to the expression "*the road to hell is paved with good intentions*".

2.16. In considering the 'scope/applicability' of the Convention, one should not only look at Article 1 but also at Article V, that is, the grounds upon which the recognition and enforcement of an award can be refused or the award can be set aside. Whilst out of sequence if taking a chronological stroll through the Convention it is considered, for that reason, to be appropriate to deal with Article V at this stage.

Article V – recognition and enforcement may be refused

2.17. As mentioned above, in having regard to the application of the Convention, one must necessarily consider the setting aside of an award. Setting aside is where a party is dissatisfied with the award and wants to have it set aside legally. This is different to 'enforcement' and/or seeking to have the enforcement refused.

2.18. In regard to enforcement, the fact of, and requirement for, enforcement may well be substantively different from country to country – that is whether you can get that court's permission to enforce an award where you want to enforce it (i.e. other than where the arbitration took place).

2.19. What is important to note is that the Convention itself does not govern the setting aside of an award as such – that is a matter for the arbitration law of the place of the arbitration. In fact, setting aside an award is the exclusive jurisdiction of the courts at the place where the arbitration took place and is educated by the laws of that country. That, therefore, is in contra-distinction to enforcement.

2.20. This distinction is noted as the setting aside of an award in the country where the award was made is indicated, in Article V(1)(e), to be a potential basis upon which the enforcement of an award may be refused. This will be dealt with further during the consideration of Article V that follows.

2.21. Article V of the Convention provides for an exclusive list of seven grounds on which recognition and enforcement of the award may be refused. These grounds are intended to be exhaustive, and are designed to be limited in scope so as to enhance the prospects of enforcement.[15] A critical aspect of the Convention's effectiveness is that it does not *per se* permit any review on the merits of an award to which the Convention applies[16]. This becomes a little fudged when one looks at the implications of Article V(2) (b) where considerations of public policy in the jurisdiction where the award is sought to be enforced arguably 'impact' upon the determination of the merits.

2.22. There are five separate grounds for refusing recognition and enforcement of an award at the request of the party against whom it is invoked.[17] It is clear from the text of Article V(1) of the Convention that the burden of proof is intended to be on the party who asks the relevant court to refuse recognition and enforcement of the award. Article V(2) of the Convention contains two further grounds for refusal of recognition and enforcement, that can be engaged by the relevant enforcing court on its own motion[18], one of which relates to the public policy of the place of enforcement

2.23. On the English text it is suggested that it is clear from the drafting of Article V of the Convention that the relevant enforcing court has discretion

14. Arbitration Act 42 of 1965
15. Redfern (n 2) para 11.57
16. Redfern (n 2) para 11.56
17. Article V(1) of the Convention
18. Redfern (n 2) para 11.58

on refusal, even where a ground for refusal is proved to exist (the word "*may*" rather than "*shall*" is used i.e. the language is permissive, not mandatory).[19] Is this in fact so? This suggestion both warrants and receives further consideration in paragraph 2.46 below.

2.24. Whilst the majority of national courts have recognised the main features of the Convention[20] (for example, there has been approval in the United States[21] of the pro-enforcement nature of the Convention), not all national courts will take the same approach when interpreting the Convention and certain courts (the United States in particular) have adopted what has been criticised as being "*fanciful*" interpretations of the Convention[22]. It is suggested that the public policy grounds for refusing recognition and enforcement have at times been used by courts in contracting states in a way that does not accord with the international spirit of the Convention. Such lack of consistency may be considered as one of the current flaws of the Convention, however there is a strong school of thought that problems of this nature should not be exaggerated since the Convention has proved to be a highly effective international instrument for the enforcement of arbitration agreements and awards.[23]

2.25. The grounds of refusal of recognition and enforcement of foreign arbitral awards are briefly set out and considered below. While courts decisions provide guidance on interpretation of the Convention, inconsistent decisions on its provisions are obviously undesirable, however, could be said to highlight the flaws that exist within the Convention in its current form.

2.26. The first ground of refusal is that the parties to the arbitration agreement were under some incapacity or the arbitration agreement is not valid under the law applicable to the agreement, or if that is not specified, under the law of the country where the award was made.[24]

2.27. Whilst at first blush this seems to be in order, what law is being contemplated in regard to a particular party? The law applicable to a natural person (i.e where domiciled) may be different to the law that is considered to be applicable to a juristic person (i.e where incorporated?) which, in turn, may have totally different considerations in terms of the law that the parties may have agreed governs the contract and/or arbitration process. This gives rise to questions of capacity. Depending on the provisions of the applicable law, the capacity of a party may be impacted upon or may differ. Indeed, the issue of capacity to enter into an arbitration agreement often arises in cases concerning state agencies e.g. whether the state agency had the capacity to enter into a contract on behalf of the state in question.[25]

2.28. An example of this ground being used to resist enforcement was seen in the case of *Dallah Real Estate v Pakistan*.[26] The UK Supreme Court refused enforcement of an ICC award made against the Government of Pakistan in France on the basis that the agreement containing the arbitration clause was deliberately structured to be agreed between Dallah and the government owned Awami Hajj Trust. The Government of Pakistan was not a party to the arbitration agreement and so the award would not be enforced by the English courts.

2.29. The same considerations apply to the required validity of the agreement; a common basis for an attack on the recognition and enforcement of an award. Did the main agreement contravene any legislation that is applicable in the particular law; what is the position in regard to ostensible authority of a director to conclude a contract versus no authorisation to do so under and in terms of such law, and what are the applicable provisions of that law in regard to misrepresentation (innocent or deliberate); mistake (unilateral or bilateral) etc?

2.30. Such a scenario can lead to the situation where a successful party seeking to enforce a ruling in a particular jurisdiction of the losing party is then faced with a defence to the enforceability of such award on the basis of that particular legal system; impacting not only on the substantive

19. Redfern (n 2) para 11.59
20. Redfern (n 2) para 11.61
21. *Parsons Whittemore Overseas Co. v Société Générale de L'Industrie de Papier (RAKTA)* (1976) I YBCA 205
22. Albert Jan van den Berg (n 11)
23. Redfern (n 2) para 11.62
24. Article V(1)(a) of the Convention
25. Redfern (n 2) para 11.66
26. [2010] UKSC 46

law but also the procedural law to be adopted in association with meeting the challenge made. Who then determines the validity of the arbitration agreement – the arbitrator or the courts (who aren't bound by the arbitrator's decision in that regard)? Is this something that the Convention ought not to have provided for? In having not done so by, presumably, trying to cater for issues of sovereignty, the position that two authorities may well decide on the validity of an arbitration agreement arises.

2.31. The second ground of refusal is that the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.[27] This is said to be the most important ground for refusal under the Convention as it ensures that the requirements of due process are observed and that the parties are given a fair hearing (*audi alteram partem*). While the approach to this provision may vary between national courts, it is suggested that only significant and material incidents in the course of the arbitral proceedings should lead the relevant court to decide that there was a lack of due process.[28] Whilst the passage of time (i.e. e-mails, sms messaging and WhatsApp messages) has changed the traditional modes of written notification and considered receipt of a communication applicable at the time that the Convention came into being, bar for certain perplexing issues that arise in regard to, for example the place of receipt of a communication and the conclusion of a deal, issues of notification is again something which falls outside of the Convention and is the subject matter of the applicable law, *inter alia*, where the award is being sought to be enforced/refused. A further opportunity to erode the predictability championed by the Convention therefore arises.

2.32. The situation is, however, more stark when looking at the terms "*or was otherwise unable to present its case*". Whilst, in the context, one can imagine that similar objectively prohibitive obstacles leading to non-attendance/total failure to present a case was probably envisaged, the loose wording utilised could open the door to an effective review of the process by the courts and an erosion of the integrity of the arbitral sphere by the courts– i.e. was a party prohibited from or prejudiced in the presentation of its case by the arbitrator or perhaps a particular procedural ruling by the arbitrator? Such possibility ought not to be countenanced.

2.33. The third ground of refusal envisages two situations as follows: (1) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration (i.e. the arbitral tribunal did not have jurisdiction to make the award) (*ultra petita*); or (2) in making the award the tribunal partially exceeded its jurisdiction. In the latter case, the part of the award concerning issues that were properly submitted to the arbitral tribunal may be recognised and enforced.[29] [30]

2.34. The fourth ground of refusal can be engaged where it is shown that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the place of the arbitration.[31]

2.35. It is worth noting that the Geneva Convention of 1927 provided that enforcement of an award could be refused if the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with both the parties' agreement as well as the law of the place of the arbitration. This double requirement meant that enforcement would not be granted where the arbitration was not conducted in strict accordance with the law of the place of arbitration. The Convention does not contain this double requirement and prioritises the parties' agreement, that is the law of the place of the arbitration is only taken into account where there is no agreement.[32] This, it is submitted, constitutes a significant improvement to the position that had prevailed pre-Convention.

2.36. The fourth ground of refusal will be determined against the agreement of the parties, including any institutional rules adopted. Whilst it may be

27. Article V(1)(b) of the Convention
28. Redfern (n 2) paras 11.71 – 11.74
29. Article V(1)(c) of the Convention
30. *General Organization of Commerce and Industrialisation of Cereals of the Arab Republic of Syria v SpA SIMER (Società delle Industrie Meccaniche di Rovereto) (Italy)* (1983) VIII YBCA 386
31. Article V(1)(d) of the Convention
32. Redfern (n 2) paras 11.82

argued that it should only be major violations of a material nature that will engage this ground, commentators on the Convention oscillate between a strict adherence approach to one of a substantive-compliance approach with a greater emphasis upon the consequence of the non-adherence to the underlying purpose and principles of the Convention. Furthermore, whilst it is worth noting that many arbitration statutes and institutional rules contain a waiver provision (which requires a party to raise an objection when the violation occurs otherwise it loses the right to object at the stage of enforcement, and thereby ensuring that minor violations can be rectified in time or not come back to bite a party), is this an excuse to not give effect to the clear and unambiguous terms of the Convention? Courts should be faithful to the text and the structure of the Convention, and give effect to the treaty (not a contract) negotiated and concluded between sovereign states and which ought to be interpreted and applied in accordance with the requirements of the Vienna Convention 1969 (particularly Articles 31, 32 & 33) and not the poetic license of the courts.[33]

2.37. The fifth ground of refusal may apply where the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.[34]

2.38. On a strict application of the provisions of the Convention, the position ought to be relatively clear as follows:

2.38.1. If you seek enforcement of an award in the country of origin, the national arbitration law applies for enforcement unless the award is considered to not be a 'domestic' award (an approach largely followed in the USA only). If you seek enforcement of an award abroad, the Convention applies.

2.38.2. If you seek to set aside an award, the national arbitration law of the country of origin applies and its courts have exclusive jurisdiction. It is not possible to attempt to set aside the award abroad.

2.39. What ought the effect of the above to be?

2.39.1. If there is a refusal of enforcement in the country of origin then the award cannot be enforced there. Such refusal, however, has no impact upon an attempt to enforce the same award abroad.

2.39.2. If the court in the country of origin grants the enforcement of the award, you can execute on that award there. The granting of the enforcement of the award in the court of origin has no effect in regard to the ability to execute the award abroad.

2.39.3. If the award is set aside in the country of origin then, legally, it no longer exists/ ought to no longer exist. The position abroad ought then to be that an attempt to enforce such award ought to be refused under Article VI (e).

2.40. This ground, however, is said to have given rise to more controversy than any of the previous grounds as it has raised a broader theoretical question on whether awards annulled at the seat can be enforced elsewhere.[35] There are examples where the courts in the place of enforcement have been prepared to recognise and enforce arbitral awards even though they have been annulled by the courts of the seat of the arbitration.[36] The proffered reasons for this include: (i) the permissive language of the Convention (as mentioned at paragraph 2.23 above); and (ii) the fact that the Convention does not prevent operation of more favourable provisions contained within other laws or agreements that may allow for recognition and enforcement of the arbitral award.[37] Whilst the permissive nature is certainly one that is open to challenge (see paragraph 2.46 *et seq* below), with respect, the latter suggestion (i.e. in "(ii)") is an intellectually anorexic attempted application of Article VII(1).

2.41. This approach of being prepared to recognise and enforce arbitral awards even though they have been annulled by the courts of the seat of the arbitration is influenced by the theory of

33. Albert Jan van den Berg (n 11)
34. Article V(1)(e) of the Convention
35. Redfern (n 2) paras 11.87 – 11.88
36. Redfern (n 2) paras 11.93
37. Article VII(1) of the Convention

delocalisation, which proposes that an arbitral award does not derive its legal existence from the domestic law of the seat but rather from a transnational legal order whereby its validity is examined in accordance with the rules of the country where enforcement is sought.[38]

2.42. There are examples of French[39] and US[40] courts recognising and enforcing arbitral awards that have been set aside by the courts of the seat of the arbitration. However, generally speaking, courts are more likely than not to decline to enforce annulled awards.[41] [42] The approach of the French and US courts tends to reflect the transnational character of international arbitration in these countries. By contrast, there are many countries that tend to regulate the validity of an arbitral award by reference to the law of the seat (e.g. England).

2.43. The Yukos case is an example of an arbitration award, in Russia, not being enforced in terms of Article V(1)(c) by a court in the Netherlands (the Hague District Court). The basis of the award stemmed from the arbitral tribunal's jurisdiction firmly contained in the Energy Charter Treaty ("**ECT**") which the Hague District Court found Russia, although a signatory to the ECT, had not ratified. The Hague District Court concluding that an un-ratified treaty may not take precedence over Russian domestic law.[43] Notwithstanding this decision to set aside the arbitral award, the topic up for debate in the international arbitration community and as discussed in paragraph 2.40 above is whether or not the arbitral award may be enforced in an appeal court or a court in another jurisdiction.

2.44. The question will 'soon' be answered as Yukos Shareholders have appealed (sought to enforce the arbitral decision) the Hague Districts Court decision in various jurisdictions including Belgium, France, the UK and the USA, although the hearing of the appeal may take years. Notwithstanding this lengthy process embarked upon by the Yukos Shareholders, as discussed at paragraph 2.40 above, it may very well be the case that a court enforces the Yukos arbitral award.

2.45. The challenge with the asserted ability to enforce an arbitral award that has been set aside by a court at the seat of the arbitration is the lack of finality in the matter and ultimately the lack of certainty within the overall arbitral system – two characteristics which the Convention, at its genesis, sought to avoid/address.

2.46. As mentioned in paragraph 2.40 above, this approach is said to be rationalised on the permissive rather than mandatory nature of the language utilised in Article V. As queried in paragraph 2.23, is this indeed the case?

2.47. Let us quote the relevant sub-Article:

> "*recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes the competent authority proof that…*"(underlining added)

2.48. The suggestion is that the word "*may*" in Article V.1 provides the court with the discretionary power to enforce that award notwithstanding the existence of one of the stated grounds of refusal.

2.49. But that is not what the Article says/empowers. The word "*may*" should not be read in isolation. The sentence limits the grounds for refusal of enforcement to only those appearing in Article V.1. The operative words are "*may ….only if*". That is the natural meaning of "*may….only if:*"[44]

2.50. One needs to consider the words used in the various authentic texts of Article V.

2.50.1. English: "*…may be refused … only if…*";

2.50.2. French: " *…ne seront refuses..que si*" meaning "*shall be refused …only if*";

2.50.3. Spanish: "*Solo sepodrá denegar….si*" meaning " *…may be refused….only if*";

2.50.4. Chinese: "*wel yu…shi de …ju yu*" meaning "*can be refused…only if*";

2.50.5. Russian: "'*mozhet byit otkazono….tolko call*" meaning" *….may be refused only if*".[45]

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38. Paulsson, *Arbitration Unbound: Award Detached from the Law of its Country of Origin* (1981) 30 ICLQ 358 also see *Hilmarton v Omnium de Traitement et de Valorisation*, Cass civ 1, 23 March 1994, ASA Bulletin 1994
39. *Société PT Putrabali Adyamulia v Société Rena Holding et Société Mnogutia Est Epices* [2007] Rev Arb 507
40. *Chromalloy Aeroservices Inc. v Arab Republic of Egypt* 939 F.Supp 907 (DDC 1996)
41. Redfern (n 2) paras 11.97
42. *Baker Marine (Nig.) Ltd v Chevron (Nig.) Ltd* 191 F.3d 194 (2nd Cir. 1999)
43. *The Russian Federation v Veteran Petroleum Limited, Yukos Universal Limited and Hulley Enterprises Limited* (C/09/477160/HA ZA 15-1, 15-2 and 15-112)
44. Albert Jan van den Berg (n 11)
45. Albert Jan van den Berg "Reflections on the 60th Anniversary of the 1958 New York Convention on the Recognition and Enforcement of Foreign Awards" lecture, 8 March 2018

2.51. Having consideration for these texts then the word "*may*" is rather to be read as an empowering provision/characteristic than a discretionary one and, therefore, not as the discretionary power to enforce an award notwithstanding the existence of a stated ground for refusal.

Article V(2) – refusal based on arbitrability or public policy grounds

2.52. Under Article V(2) of the Convention there are two additional grounds upon which an award may be refused enforcement. What makes these two grounds different is that they may be raised by the enforcement court on its own volition (i.e. regardless of whether the ground in question has been raised by a party).

2.53. The first of these grounds is that the subject matter of the difference is not capable of settlement by arbitration under the law of the country where recognition and enforcement is sought.[46] This ground is concerned with arbitrability, which under the Convention is a question for the law of the place of recognition and enforcement. Arbitrability is largely governed by public policy and will therefore vary as between contracting states.[47] An example of this can be seen in the Russian case of *Maximov v Novolipetsky Metallurgicheskiy Kombinat*[48] concerning a dispute over a contract to purchase shares in a Russian incorporated company. The Supreme Commercial Arbitrazh Court held that the Russian Commercial Procedure Code precluded the arbitrability of corporate governance disputes and accordingly upheld the decision of a lower court to set aside the award.

2.54. The other ground of refusal is that the recognition and enforcement of the award would be contrary to the public policy of the country in which it is sought.[49] This is arguably the ground on which the enforcing courts have the most discretion in refusing recognition and enforcement of an award since there is no uniform definition of public policy. Each jurisdiction will have a slightly different definition of public policy.

2.55. It is said that public policy "*reflects the fundamental economic, legal, moral, political, religious and social standards of every State or extra-national community. Naturally public policy differs according to the character and structure of the State or community to which it appertains, and covers those principles and standards which are so sacrosanct as to require their maintenance at all costs and without exception.*"[50] Furthermore, in an attempt at harmonisation, the Committee on International Commercial Arbitration of the International Law Association (ILA) has sought to offer definitions of the concepts of "*public policy*", "*international public policy*", and "*transnational public policy*". The Committee defined "*international public policy*" as that "*part of the public policy of a state which, if violated, would prevent a party from invoking a foreign law or foreign judgment or foreign award.*"[51]

2.56. Generally speaking, it is thought that the English courts would be unlikely to refuse the recognition and enforcement of an award on the grounds of public policy.[52] An exception is the case of *Soleimany v Soleimany*[53] where the English Court of Appeal refused to enforce an arbitral award that gave effect to an illegal contract on the grounds that it would be contrary to public policy to do so.

2.57. While under Article V(2)(b) of the Convention it is clear that it is the public policy of the country of enforcement that we are concerned with, there has been some debate as to whether there is a difference between domestic and international public policy.[54] Logically there is but the question is 'should there be'? It is suggested that, to date, most national courts have recognised that when dealing with recognition and enforcement of awards under the Convention they should give the notion of public policy an international dimension. There are examples of this approach from the courts in the US[55], India [56], and France[57].

46. Article V(2)(a) of the Convention
47. Redfern (n 2) paras 11.102
48. Case No. N VAS-15384/11, Ruling of the Supreme Commercial Arbitrazh Court, 30 January 2012
49. Article V(2)(b) of the Convention
50. *Lew, Applicable Law in International Commercial Arbitration* (Oceana, 1978), section 402
51. ILA, Final Report of the Committee on International Commercial Arbitration on Public Policy (2004) 1 TDM
52. Redfern (n 2) para 11.106
53. [1999] QB 785
54. Redfern (n 2) para 11.109
55. *Parsons Whittemore Overseas Co. Inc. v Société Générale de l'Industrie du Papier* (RAKTA) 508 F.2d 969 (2nd Cir. 1974)

2.58. Historically most national courts have indeed recognised that, in applying their own public policy to Convention awards, they should try give the notion of public policy an international, and not a domestic dimension. Whilst this approach aims to limit the cases in which public policy may be raised as a defence against the enforcement of an award, the question is 'will such approach survive the future'? Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice. Should not a definition of public policy have been attempted; something along the lines of a definition that incites uniformity but doesn't detract from sovereignty, rather than leave it solely at the doorstep of the country where the enforcement is being sought; where the ideals of uniformity and predictability were likely to be trodden upon?

2.59. A helpful indication of what should have been considered is the statement made by the court in the case of *Krombach v Bamberski*[58], which concerned recognition and enforcement of a court judgment under the 1968 Brussels Convention. There the ECJ stated that recourse to the public-policy clause in the 1968 Brussels Convention "*can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.*"

2.60. But, as mentioned, that is historically. There has recently been a growth around the world of populism; as seen in the – USA, UK (Brexit), France, Germany; also referred to as "*Trumpism*"

2.61. Nigel Farage, the face of the United Kingdom Independence Party, is quoted as saying that real power in the modern day resides ever more "*massively*" in personalities, not formal titles[59]. In the wake of this, the prospects of the sacrifice of a local jurisdiction's public policy to that of the international community needs to be measured. It is submitted that the negative prospect of such an approach being adopted going forward is, furthermore, bolstered by the fact that the wording of Article V.2(b) clearly refers to the public policy of the country where enforcement is being sought.

Article V – are the grounds of refusal exhaustive?

2.62. It is suggested that the grounds for refusal in Article V of the Convention are exhaustive. However, there are examples of courts refusing enforcement based on other articles of the Convention. An example is the US case of *Monegasque de Reassurance SAM (Monde Re) v NAK Naftogart of Ukraine and State of Ukraine*[60], where the court refused enforcement of a Moscow award on the grounds of *forum non conveniens*. The court rejected the argument that Article V of the Convention sets out the only grounds for refusing recognition and enforcement of foreign arbitral awards and decided that Article III of the Convention made the enforcement of foreign arbitral awards subject to the procedural law of the courts where enforcement is sought, which in this case included the rule of *forum non conveniens*.

2.63. There is no basis in the Convention for the introduction of such ground and it serves only to erode the certainty and predictability associated with the Convention

Article II – arbitration agreements

2.64. The intention behind the Convention is to enforce written arbitration agreements. Where a dispute is subject to an arbitration agreement and

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56. *Renusagar Power Co. Ltd (India) v General Electric Co.* (US) (1995) XX YBCA 681
57. SA Laboratoires Eurosilicone v Société Bez Medizintechnik GmbH [2004] Rev Arb 133
58. ECJ Case C-7/98, [2000]
59. Populists' by Simon Shuster / London

one party insists on arbitration, the court of a contracting state is required to refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.[61]

2.65. Firstly, the Convention fails to define which arbitration agreements fall under this Article. It does not expressly tell you that a domestic arbitration agreement would not fall under it, albeit that by analogous interpretation of Article I concerning foreign awards, there should be a foreign element to it. But something as basic as this remains unclarified.

2.66. Does the Convention keep track with the modern world?

2.67. Does it include an e-mail exchange (where there is no signature of the agreement *per se*)? Well it refers to the requirement of the written agreement needing to be "signed" only when giving examples of an "*agreement in writing*". Whilst each instance ("*arbitral clause in a contract*"; "*an arbitration agreement*" and an "*exchange of letters*") would imply the presence of a signature, the further reference to a telegram does not and, as such, it keeps pace in that extent with an e-mail (ignoring for now the possible inclusion of an electronically transposed 'signature'.)

2.68. What about an oft encountered situation where a tacit agreement/tacit acceptance of an arbitration clause occurs? Example[62]: an order is placed (by "A") on specific terms. The recipient ("B") provides the goods stated, in the delivery note with attached terms of supply and delivery, to be on the basis of other terms which include an arbitration clause. The delivery note is requested to be signed and returned. A never does this but subsequently pays B the indicated price. The Convention requires an arbitration clause to be signed by the parties/in a document signed by the parties or contained in an exchange – but there was no exchange in regard to the arbitration clause. Would a dispute arising from an international contract performed on this basis be precluded form the ambit of the Convention? On a strict application of the Convention, probably 'yes'.

2.69. So does the Convention need to be amended (i.e. to say it "*shall include <u>but not be limited to</u>*") or is it left to the various courts to decide whether the provisions of Article II(2) should be regarded as being indicative and not exhaustive, thereby tacitly reading such term into the Article? It is submitted that, on a sensible interpretation of the existing provisions, it does not need to be amended. "*shall include*" clearly indicates that it is not a closed list.

Article IV – obtaining recognition and enforcement

2.70. On the face of it, a key element in the success of the Convention to date has been the simple requirements for obtaining recognition and enforcement of awards to which the Convention applies. To obtain recognition and enforcement of an award all that is required is for the party applying to supply: (a) the duly authenticated original award or a duly certified copy of the same; and (b) the original arbitration agreement or a duly certified copy of the same.[63] But is the wording of the Convention that straight forward? This will be explored further below. If the award and arbitration agreement are not in an official language of the country where recognition and enforcement is sought, certified translations of these documents are required.[64] On supply of these documents the relevant court ought to grant recognition and enforcement unless one or more of the grounds of refusal applies. The contracting states to the Convention therefore limit the requirements listed in Article IV to be the pre-conditions for enforcement that their courts can impose on arbitral awards. No additional pre-conditions can be added. Approaches, however can vary. Some courts take a practical and flexible approach towards these proof requirements with a court stating that "*one should not apply too strict a standard to the formal requirements for the submission of documents ... when ... the conditions for recognition are undisputed and materially beyond doubt*."[65] [66] Others do not.

60. 311 F.3d 488 (2nd Cir. 2002)
61. Article II(3) of the Convention
62. Albert Jan van den Berg (n 11)
63. Article IV(1) of the Convention
64. Article IV(2) of the Convention
65. Judgment of 20 April 1990, XVII Y.B. Comm. Arb. 584, 586 (1992) (Zürich Handelsgericht)
66. Born, International Arbitration: Law and Practice (2nd edn, OUP 2015), para 13

2.71. Pundits for the Convention say that the Convention enshrines a pro-enforcement policy where there is automatic recognition and enforcement of arbitral awards by national courts, subject only to a limited number of procedural and substantive grounds for refusing enforcement. This is what has made the Convention a viable framework for international commercial arbitration.

3. DOES THE NEW YORK CONVENTION PROVIDE A VIABLE FRAMEWORK FOR INTERNATIONAL COMMERCIAL ARBITRATION?

3.1. There can be no doubt that the Convention provides a viable and effective framework for international commercial arbitration. It provides for a simpler and more expedited method of obtaining recognition and enforcement of foreign arbitral awards than what was provided for in the Geneva Convention of 1927. Furthermore, it gives a much wider effect to the validity of arbitration agreements than what was given under the Geneva Protocol of 1923.[67]

The overall success and effectiveness of the Convention

3.2. There are three main reasons why the Convention has been so successful:

3.2.1. It has almost universal membership.

3.2.2. It is now generally accepted that agreements to arbitrate, and arbitration awards, will be enforced in countries that have signed the Convention.

3.2.3. It is now common for the court of one country to look to the decisions of other foreign courts when it comes to the application and interpretation of the convention. This harmonised interpretation has contributed enormously to the development of arbitration law and practice.

Should the New York Convention be revised?

3.3. On the question of flaws and potential revisions, an interesting starting point is to consider that the Convention was produced in an effort to replace the Geneva Convention of 1927, which was only in use for a period of 30 years. The Convention has now been in force for double that period, and during that time has been subjected to various interpretations by different contracting states, often for local or political reasons. This has led to the suggestion that the effectiveness of the Convention has been weakened over time.[68]

3.4. The proposed revision of the Convention is a question that divides opinion. Professor van den Berg has stated, at his lecture on the 60th Anniversary of the Convention, that an amendment is the only viable solution.[69] This, it is noted, is different to his opinion 20 years before, namely on the 40th Anniversary of the Convention. In such paper[70] in 1998 he said of the Convention: "'*If it ain't broke, don't fix it*' ", and then went on to say that "*I respectfully submit that with these measures the convention will remain a success during the next 40 years*". Thus his current view is not only at odds with his previous views, but might be said to be contrasted with the view of Professor Gaillard, who on the 50th anniversary of the Convention made clear his support for the view that the Convention should not be revised. This was based on the "*three* NOs": (1) there is no need to revise the Convention; (2) there is no hope to achieve a better instrument than the existing Convention; and (3) there is no danger in leaving the existing Convention untouched.[71]

3.5. It is clear that the Convention has been a highly effective international legal instrument. However, the flaws and issues identified above do not suggest that there is a need for some reform. What they show is that it is the non-adherence to the current wording and intention of the Convention by the courts as well as the inconsistent and/or on occasion misguided views of academics that have done damage to

67. Redfern (n 2) para 11.40
68. Redfern (n 2) paras 1.214
69. Albert van den Berg (n 11)
70. 'Striving for uniform interpretation", United Nations Publication, Sales No. E.99.V.2, ISBN 92-1-133609-0 at page41
71. Gaillard, *The Urgency of Not Revising the New York Convention / 50 Years of the New York Convention*, ICCA Congress Series No. 14, Dublin, A.J. van den berg ed., Kluwer Law International, 689 (2009)

the practical effect of the Convention, and not the Convention itself. Yes, as highlighted, it has its flaws, and has taken knocks. It may not be a Rolls Royce, but rather a clapped-out VW beetle, however, it will still get you to the same destination, or very close to it, as a Rolls Royce will, perhaps not as fast or as comfortably, but still there or thereabout.

3.6. The divergence of recent decisions that van den Berg notes from the various national courts disinclination to enforce judgements is probably due, in a large part, if not in the main, to the increase in populism and not in a failure in the wording of the Convention itself. Such populism also casts a shadow of doubt over the prospects of the same signatories, and others, being prepared to sign a further/revised Convention.

3.7. With a new treaty/convention will also come issues of uncertainty as to which convention to apply; what to do with matters that arose before the revised/new treaty etc. to name a few.

3.8. So what can be done? Perhaps this could take the form of further guidance, rather than revision to the existing instrument. That may not, however, go far enough for some. What then about the formulation and conclusion of an internationally recommended text of statutory provisions for enforcement of foreign awards outside the Convention[72]? These are suggested to be the options that potentially enjoy the greater prospect of success due to international uptake thereof notwithstanding the advent of populism as, while a new instrument may be the preferred option, there is a risk that contracting states will not be willing to sign up to a new version or invest time in the same.

3.9. Will a successful revision at some stage inevitably occur? A reality-check needs to be undertaken on whether there will, in the first instance, be an infallible substitute treaty capable of being drafted and, secondly, what the uptake on it will be by the various sovereign states? Certainly the generation of a new treaty would be viewed by optimists as an opportunity to increase the number of current signatories, with Africa being an example of one continent where it is noticeable that a number of states are not signatories. But the following caution necessarily needs to be made: What is the definition of a pessimist? It is an experienced optimist.

72. As per van den Berg, in his 1998 paper (supra)

CONTRACTING STATES
OF THE NEW YORK CONVENTION

... Continued from page 42

Nigeria
North Macedonia
Norway
Oman
Pakistan
Palau
Panama
Papua New Guinea
Paraguay
Peru
Philippines
Poland
Portugal
Qatar
Korea
Moldova
Romania
Russia
Rwanda
Saint Vincent & Grenadines
San Marino
Sao Tome & Principe
Saudi Arabia
Senegal
Serbia
Seychelles
Singapore
Slovakia
Slovenia
South Africa
Spain
Sri Lanka
State of Palestine
Sudan
Sweden
Switzerland
Syrian Arab Republic
Tajikistan
Thailand
Trinidad & Tobago
Tunisia
Turkey
Uganda
Ukraine
United Arab Emirates
United Kingdom
Northern Ireland
United Republic of Tanzania
United States of America
Uruguay
Uzbekistan
Venezuela
Viet Nam
Zambia
Zimbabwe

List of contracting States taken from http://www.newyorkconvention.org/list+of+contracting+states

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APPRAISAL OF THE EFFECTIVITY OF THE 1958 NEW YORK CONVENTION ON THE OCCASION OF ITS 60TH ANNIVERSARY

By Marlene Wethmar-Lemmer

1. INTRODUCTION

The enactment of the International Arbitration Act 15 of 2017 constitutes an important development in South African law. With the incorporation of the UNCITRAL Model Law, there is novel statutory provision for international commercial arbitration in South Africa. This Act also incorporates the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[1] (repealing the 1977 Act), therefore creating one source containing all the relevant rules pertaining to international arbitration and enforcement proceedings.

The New York Convention currently has 159 contracting states[2] from all legal traditions. It is not a voluminous convention, it contains no truly contentious provisions. These features most certainly contributed to the large number of states acceding. South Africa acceded to the New York Convention on 3 May 1976. A critical analysis of the New York Convention's current status and effectivity is most relevant sixty years after its inception. The outcomes of such a study is also most topical in view of the fact that South Africa recently joined the ranks of states that have effective international commercial arbitration legislation.

2. APPRAISAL OF THE NEW YORK CONVENTION

There are certain salient features of the Convention that has made it a workable vehicle for the recognition and enforcement of foreign arbitral awards for sixty years. There are also certain provisions that are now dated or that may be open to divergent interpretation. In order to assess its effectivity accurately, a brief overview of the Convention's substantive provisions (articles I – VII) will be provided before more focus will be placed on specific shortcomings and recommendations for its possible modernisation.

2.1. Scope of application

Article I (1) determines the scope of the Convention as finding application to the recognition and enforcement of arbitral awards handed down outside the territory of the State in which its enforcement is sought. In addition, this provision states that the Convention shall also apply to the of arbitral awards not considered as domestic in the State where their recognition and enforcement are sought. The latter provision affords a contracting state with broad autonomy to broaden the Convention's sphere of application.[3] It has been pointed out that the discretion afforded to Contracting States to broaden the scope of application may lead to legal uncertainty in certain instances.[4] The definition of "foreign" or the elements constituting "internationality" vary from one jurisdiction to the next. In this respect, the conflict of laws rules of the forum will be relevant to identify the factors used to determine the nationality of a dispute.[5]

Furthermore, the Convention applies to "arbitral awards", but it lacks an exhaustive definition of the term. It merely refers to the fact that arbitral awards include awards handed down by ad hoc arbitral panels as well as by institutional arbitration bodies.[6] In this context, it is controversial whether such an award includes an award for interim measures or whether the latter falls under the exclusive jurisdiction of the relevant national court. The early view was that this matter falls under the absolute jurisdiction of a national court structure,[7] but this interpretation may be subject to change in light of the UNCITRAL Arbitration Rules and the UNCITRAL Model Law on International Commercial

1. See text of the Convention, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html (accessed 2 November 2018).
2. See the status table of the New York Convention available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.
3. Di Pietro and Platte *Enforcement of International Arbitration Awards. The New York Convention of 1958* (Cameron May, London 2001) 23.
4. *Idem* at 24. However, the authors point out that the Convention has a "pro-enforcement" approach and this provision should not prejudice an applicant seeking enforcement.
5. Di Pietro and Platte (2001) 29.
6. Article I(2).
7. Di Pietro and Platte (2001) 37. Some commentators advocate the view that national courts and arbitral tribunals have concurrent jurisdiction to provide for interim measures, but this argument is also fraught with difficulty.

Arbitration expressly allowing arbitral tribunals to award interim measures.[8] The enforcement of same is, however, still problematic as will be further elucidated under paragraph 3.

Article I(3) allows contracting states to make a reciprocity reservation – declaring at the time of signature/ratification or accession that it would only apply this Convention to arbitral awards made in the territory of another Contracting State. Due to the very high number of Contracting states, the impact of this reservation should no longer be substantial.

Furthermore, this sub-article allows states to make a commercial reservation – declaring that they will only apply this Convention to matters classified as "commercial" under their national law. The question of whether a matter is to be classified as "commercial" for purposes of this reservation is therefore governed by the domestic law of the forum in which recognition and enforcement of the award is sought.[9] The UNCITRAL Secretariat Commentary indicates that the term "commercial' should be afforded a broad interpretation, its purpose only being to exclude "matrimonial and other domestic relations awards, political awards and the like".[10] The words "whether contractual or not" have been interpreted as including tort / delictual claims.[11]

It needs to be borne in mind that, in general, reservations impact negatively on a Convention's uniform interpretation and application.

2.2. Recognition of the arbitration agreement

In essence, article II of the Convention requires a forum in a contracting state to recognise a written arbitration agreement that meets certain conditions and to enforce this agreement[12] by referring the parties to arbitration.[13] Four basic requirements may be distilled from this sub-article for its recognition. Firstly, there must be an agreement in writing to refer disputes to arbitration. Secondly, there must be an existing dispute. Several cases found that, in the absence of a clear agreement between the parties to the contrary, arbitration clauses are to be given the broadest interpretation possible, since businessmen would "likely have intended that any dispute arising out of the relationship into which they have entered, to be decided by the same tribunal".[14] Thirdly, there must be a defined legal relationship (contractual or non-contractual) and fourthly, the matter must be arbitrable.[15] Of great importance is the mandatory nature of this recognition of an arbitration agreement complying with these requirements.[16]

A question arose as to whether this provision only applies to arbitration agreements providing for a foreign seat, but the better view is that it applies to all arbitration agreements, regardless of the seat of arbitration.[17]

The phrase "capable of settlement by arbitration" in article II(1) refers to the arbitrability requirement and raises questions of how and in terms of which legal system this question is to be answered. Matters not capable of settlement by arbitration are mostly those matters that are of specific public interest, and therefore usually a question of (domestic) public policy.[18] In general, jurisdictions do not allow criminal law or family law matters to be subjected to arbitration. On the contrary, commercial matters (and matters related thereto) are generally regarded as arbitrable. Certain controversial matters in this regard, however, include intellectual property and securities transactions.

Several commentators support the notion that the *lex arbitri* should be applied to the determination of objective arbitrability.[19] Case law authority may be found in support of determining arbitrability in line with the conflicts rule contained in article V(1)(a) of the Convention – the law to which the parties have

8. UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments adopted in 2006, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (accessed 1 November 2018), UNCITRAL Arbitration Rules available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html (accessed 2 November 2018).
9. Di Pietro and Platte (2001) 58.
10. UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958) 2016, available at www.uncitral.org/pdf/english/texts/.../NY-conv/2016_Guide_on_the_Convention.pdf at 34 referring to a dictum from *Island Territory of Curacao v Solitron Devices Inc*, Court of Appeals, Second Circuit, United States of America, 14 February 1973, 356 E Supp 1.
11. UNCITRAL Secretariat Guide at 35, referring to various cases and the fact that the Convention's *travaux preparatoires* also supports this interpretation.
12. Article II(2).
13. UNCITRAL Secretariat Guide 39.
14. *Idem* at 48 and see, for example, *Fiona Trust and Holding Corp v Privalov*, Court of Appeal, England and Wales, 24 January 2007.
15. Di Pietro and Platte (2001) 66.
16. UNCITRAL Secretariat Guide 42 – 43 and cases cited in n 202.
17. *Idem* at 40.
18. Di Pietro and Platte (2001) 91.
19. Di Pietro and Platte (2001) 66.

subjected the arbitration agreement, or, failing any choice in this regard, the law of the country where the award was made.[20] The phrase "where the award was made" in this context is interpreted as a reference to the seat of arbitration. Thirdly, courts have applied the *lex fori* to determine arbitrability.[21] This question has therefore not been dealt with uniformly and still needs to be settled definitively.[22]

Article II(2) provides more detail regarding the writing requirement in respect of arbitration agreements. This provision has been the object of much criticism and debate and will also be discussed under paras 3 and 4 below. The writing requirement is important for evidence purposes. Many national legal systems require an arbitration agreement to be in writing. The New York Convention's definition of an agreement in writing is quite narrow and strict in light of current technology-driven international trade practice – the arbitration agreement needs to be signed by the parties or contained in an exchange of letters or telegrams. These requirements are, however, not cumulative. If the parties express their intent in writing, the "exchanged" documents do not have to be signed by the parties. Also, "exchange of documents" covers any documents or other written communication, and is not restricted to letters or telegrams.[23]

The writing requirement has to be read together with the 2006 UNCITRAL Recommendation regarding the interpretation of Article II(2).[24] Since this document, courts have more readily enforced arbitration agreements pursuant to less strict formal requirements under relevant domestic law or treaties.[25]

Article II(3) places an international law obligation upon courts in Contracting states to refer a matter - in respect of which an arbitration agreement is in existence - to arbitration upon request by a party unless the agreement is "null and void, inoperative or incapable of being performed".

Two approaches have been followed in adhering to the article II(3) obligation. The civil law approach entails declining jurisdiction due to the arbitration agreement.[26] The predominantly common law approach is to stay judicial proceedings. In any event, the court retains "jurisdiction over matters relating to the assistance of arbitral proceedings, for example the issuing of interim measures".[27]

The obligation to honour the arbitral agreement in article II(3) is triggered "at the request of one of the parties". It has, however, been asked whether a court may refer parties to arbitration *ex officio*.[28] The best view in this regard is that arbitration is based upon consent, and parties may waive their agreement to arbitrate. Therefore, the court will only refer the matter to arbitration upon request, in *lieu* of which it will exercise its own jurisdiction.

Another matter to be considered in respect of article II(3), is the "standard of review" of the arbitration agreement by a court when having to determine its validity. According to the case law scrutinised in the UNCITRAL Secretariat Commentary in this regard, two trends are discernible.[29] Certain courts conduct a full review of the validity of the agreement, others limit it to a *prima facie* enquiry.[30] In ascertaining whether the agreement is "null and void", courts have applied the *lex fori* or the law applicable in terms of the conflicts rule contained in article V(1)(a) of the Convention.[31] Instead of applying domestic law pursuant to conflicts rules, American and English courts have opted for applying an "international standard of contract law defences."[32] In several instances they determined "null and void" in terms of "standard breach of contract defences that can be applied neutrally on an international scale, such as fraud, mistake, duress and waiver".[33] It needs to be mentioned that giving an international interpretation to such terms is certainly supported within the UNCITRAL framework. Several of their Conventions require that in its interpretation, regard is to be had

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20. UNCITRAL Secretariat Guide 49, citing *Misr Insurance Company v Alexandra Shipping Agencies Company*, Court of Cassation, Egypt, 23 December 1991.
21. UNCITRAL Secretariat Commentary 49 and cases cited in n 236 – 246 thereof.
22. On this topic, see, for example, Hanotiau B "What law governs the issue of arbitrability?" (1996) 12 (4) *Arbitration International* 391.
23. *Idem* at 55.
24. Recommendation Regarding the Interpretation of Article II, paragraph 2, and Article VII, par 1 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (2006), available at www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf (accessed on 31 October 2018).
25. UNCITRAL Secretariat Guide 51.
26. UNCITRAL Secretariat Guide 58, referring primary to French and Swiss cases in n 281
27. *Ibid.*
28. UNCITRAL Secretariat Guide 59
29. At 62-64.
30. *Ibid.*
31. Good authority is found for this approach in a case decided by the Federal Supreme Court of Switzerland, 21 March 1995, 5C.215/1994/lit.
32. UNCITRAL Secretariat Guide 70.
33. *St Hugh Williams v NCL (Bahamas) LTD, dba NCL*, Court of Appeals, Eleventh Circuit, United States of America, 9 July 2012, 11-12150; *Allen v Royal Caribbean Cruise, Ltd*, District Court, Southern District of Florida, United States of America, 29 September 2008, 08-22014.

to, *inter alia*, its "international character" and to the need to promote uniformity in international trade.[34] This provision requires that words and phrases rather be given an internationally acceptable meaning than being interpreted in a domestic law context.

In general, courts have regarded "inoperative" as covering situations where the arbitration agreement has become inapplicable to the parties or their dispute".[35] Lastly, "incapable of being performed" is understood as "relating to situations where the arbitration cannot effectively be set in motion".[36]

In the South African context, it is important to note that the repealed Recognition and Enforcement of Foreign Arbitral Awards Act of 1977, did not contain a provision enacting article II(3) of the New York Convention insofar as specifically providing for enforcement of arbitration agreements. Courts afforded themselves a wide discretion to recognise arbitration agreements and to stay proceedings. However, the position has now changed under the new International Arbitration Act. Section 16(3) of the Act requires that "a foreign arbitral award *must*, on application, be made an order of court" and this obligation is only subject to the exhaustive grounds for refusal listed in section 18.

2.3. Recognition and enforcement of the arbitral award

Articles 3 and 4 may be termed the formalities of the enforcement procedure under the New York Convention. It has been noted that one of the strengths of the New York Convention is its simple formal enforcement procedures that very rarely create controversy or difficulty. It also deserves mentioning that courts are seldom faced with matters wherein they have to rule on non-compliance with these two articles.[37]

The statement in article III that "each Contracting State shall recognise arbitral awards and enforce them" is often referred to as the Convention's "pro enforcement bias".[38] Article III furthermore prohibits a court from imposing "substantially more onerous conditions or higher fees or charges on the recognition and enforcement of arbitral awards to which this Convention applies than are imposed on the recognition and enforcement of domestic arbitral awards". It is important to note that the term "conditions" do not refer to conditions of enforcement. The latter are confined to those set out within the Convention, and do not refer to conditions governing domestic arbitral awards.[39] The "conditions" referred to here concern matters such as the competent authority and the form of the request to enforce.

Article IV requires the enforcing party to supply the original award or a duly authenticated copy thereof. Compliance with article IV provides the party seeking enforcement with a *prima facie* entitlement to same. The part resisting enforcement would then have to rely on article V.

2.4. Grounds for refusal of recognition and enforcement

Article V of the New York Convention contains the (relatively limited) and exhaustive grounds on which recognition and enforcement of an arbitral award may be refused in the competent authority in the Contracting state where said recognition and enforcement are applied for. Article V(1) lists the grounds for refusal that may be raised and argued by a party resisting enforcement, whereas article V(2) contains the grounds on which a court may refuse such enforcement suo moto. While not expressly so provided, courts have considered the burden of proof under art V(2) to also rest with the party opposing recognition and enforcement.[40]

It is important to note that this article grants courts a discretion to refuse recognition and enforcement on these listed grounds, as evidenced by the permissive word "may". However, a court entertaining an application for the recognition and enforcement in terms of the Convention is not empowered to review the merits of the arbitral tribunal's decision.[41] This principle is confirmed in all reported case law and also supported by all commentators.[42]

34. See, for example, article 7(1) of the United Nations Convention on Contracts for the International Sale of Goods (CISG) of 1980, available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html (accessed 1 November 2018).
35. UNCITRAL Secretariat Guide 72 and see, for example, *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi TBK Ltd*, High Court of Justice, England and Wales, 16 May 2013, [2013] EWHC 1240.
36. UNCITRAL Secretariat Guide 72.
37. Di Pietro and Platte (2001) 124.
38. UNCITRAL Secretariat Guide 78.
39. Di Pietro and Platte (2001) 128.
40. UNCITRAL Secretariat Guide 129.
41. UNCITRAL Secretariat Guide 126.
42. See the UNCITRAL Secretariat Guide 127 and sources listed in n 371 and 372.

Furthermore, the Convention does not allow refusal to recognise and enforce based on procedural grounds other than those listed in article V.[43]

Article V(1)(a) allows a court to refuse recognition and enforcement in two situations: firstly, if the parties to the agreement were, under the law applicable to them, under some incapacity, and secondly, if the arbitration agreement is not valid under the chosen law or in the absence of a choice of law, under the *lex arbitri* (law of the seat of arbitration). The concept of "incapacity" is not defined in the Convention, but it should carry the traditional meaning of a legal restriction preventing a party from entering into a legal and binding relationship.[44] "The law applicable to them" would refer to the law governing a party's status.

Article V(1)(b) addresses due process in arbitral proceedings and allows a court to refuse recognition if there was no proper notice given to a party of the proceedings or the appointment of an arbitrator or if the party against whom the award is sought to be enforced, did not have the opportunity to sufficiently present its case. This article is, however, silent on the form of notice to be given and also with regard to its service, and therefore no specific form requirement may be argued.

In essence, article V(1)(c) allows a competent authority in a contracting state to the Convention to refuse recognition of an arbitral award in part of in full where the award contains decisions on matters beyond the scope of submission to arbitration.

Article V(1)(d) empowers a court of a contracting state to refuse recognition and enforcement where the constitution of the arbitral tribunal or the procedure followed was not in accordance with the agreement of the parties, or, in the absence of agreement, with the law where the arbitration took place.

Article V(1)(e) authorises a national court to refuse recognition and enforcement if the party opposing enforcement proves that the award has not yet become binding on the parties or if the award has been set aside or suspended under the law in terms of which the award was made.

Article V(2)(a) allows a competent authority in the country where recognition and enforcement is sought, to refuse same if it determines that the subject matter of the "difference" is not capable of settlement by arbitration under the law of that country – ie, the *lex fori*. The phrase "capable of settlement by arbitration" in article II(2) and article V(2)(a) should be understood in the same manner.[45]

Finally, article V(2)(b) allows a competent authority in the country of seeking recognition and enforcement to refuse such if it is contrary to the public policy of the *lex fori*. The public policy exception and its interpretation and determination constitute important conflict of laws inquiries that will not be addressed here.[46]

In terms of article VI, the competent authority to which the application of setting aside or suspension of the award has been made in terms of article V(1)(a), may adjourn the decision on enforcement and may on application of the party seeking enforcement, order that security be provided by the other party.

Article VII(1) confirms that the New York Convention does not take precedence over other multilateral or bilateral agreements concerning the same subject matter and also does not prohibit a party of other rights to enforcement under the laws or other treaties applicable in the country where the award is sought to be recognised and enforced. The Geneva Protocol and Geneva Convention on the Execution of Foreign Arbitral Awards (1927) also become ineffective between contracting states once the New York Convention enters into force for the relevant state.

2.5. Other (final) provisions (art VIII – XVI)

The rest of the Convention contains mostly public international law provisions on accession, ratification and signature, entry into force, denunciations and official languages.

43. UNCITRAL Secretariat Guide 127.
44. UNCITRAL Secretariat Guide 135.
45. *Idem* at 227.
46. See, in this regard, the analysis in the Secretariat Guide at 243 - 247.

3. GENERAL SHORTCOMINGS OF THE CONVENTION HIGHLIGHTED

Many of the possible ambiguities and interpretative anomalies that may arise from the New York Convention's provisions have been highlighted in the preceding section, but it remains to emphasise the main necessities for reform and engage with scholarly proposals in this regard.

3.1. Scope of application

The fact that the New York Convention provides no clear guidance as to what matters may be arbitrated, or at least, in terms of which set of rules arbitrability should be determined,[47] may be a cause for concern and may lead to divergent approaches and interpretations by national courts in this regard. Certain commentators have suggested that an exhaustive list of non-arbitrable matters be compiled,[48] but this seems an impossible endeavour in light of hugely divergent national legal systems and national interests.

3.2. Writing requirement

As mentioned under paragraph 2 above, a literal reading of the writing requirement under article II(2) would exclude most of the modern forms of contracting and communication. However, when one considers the UNCITRAL Model Law on Electronic Commerce,[49] it becomes evident that article II(2) should be interpreted to include the use of electronic means of communication (data messages). It has also been noted that most courts tend to interpret the writing requirement in light of a "strong pro-arbitration bias".[50]

3.3. Setting aside provisions

Article V(1)(e) allows courts to refuse recognition or enforcement of foreign arbitral awards if they have been set aside by the courts of the country where they were rendered. Paulsson reiterates the inherent danger in this provision – namely that it makes the award subject to local "peculiarities" of the country where the award was handed down – "including eccentricities, or whims, or even xenophobia".[51] As Paulsson points out, this provision poses a danger to the harmonisation of dispute resolution regimes in the context of international transactions.[52] However, Paulsson states that the solution is rooted in the discretionary nature of art V – courts *may* refuse recognition of the award under these circumstances. When being asked to enforce such an arbitral award, "the enforcement judge should determine whether the basis of the annulment by the judge in the place of arbitration was consonant with international standards".[53] If not, the judge should disregard the annulment and enforce the award.

4. SHORTCOMINGS IN THE CONTEXT OF (REGIONAL) HARMONISATION

Paulsson has pointed out that two potential impediments to the New York Convention's uniform interpretation and application include the fact that it contains no preamble or list of definitions.[54]

Reservations permitted by Conventions have often hampered uniform interpretation and application of said convention. More so, since Contracting States may implement a reservation in an even more limiting manner than provided for or foreseen by the drafters of a Convention. A prime example of such a practice is found in India's interpretation and implementation of the reciprocity reservation. In its application of the reciprocity reservation, it is required under Indian law that the State that the arbitral award was handed down in, be published as Contracting state to the New York Convention in the Indian Official Gazette before an Indian court will recognise and enforce an arbitral in terms of the Convention.[55] In one case, an Indian court refused to enforce an arbitration agreement referring the dispute between parties to arbitration in South Africa, due to the fact that South Africa was not included as a Contracting State in the Indian Official Gazette, despite the fact that South Africa was indeed a contracting state at the time.[56] At the very least, this

47. This matter still gives rise to divergent scholarly interpretation.
48. Altaro and Guiamarey "Who should determine arbitrability? Arbitration in a changing economic and political environment" (1996) 12 *Arbitration International* 415 427.
49. Available at www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html (accessed 1 November 2018).
50. Di Pietro and Platte (2001) 80.
51. Paulsson J "Awards set aside at the place of arbitration" in *Enforcing Arbitration Awards under the New York Convention. Experience and Prospects* 1999 (United Nations, New York) 24 at 25.
52. *Ibid.*
53. Paulsson (1999) 26.
54. Paulsson M "The 1958 New York Convention from an unusual perspective: Moving forward by parting with it" *Indian Journal of Arbitration Law* (2017) 23 29.
55. Arbitration and Conciliation Act (India) 1996.
56. *Swiss Singapore Overseas Enterprises Pvt. Ltd v M/V African Trader*, High Court of Gujarat, India,7 February 2005.

application of the reservation would be most detrimental to the promotion of good trade relations between India and South Africa within the BRICS context. Furthermore, this mode of implementation of the reciprocity is not provided for in the New York Convention and may be regarded as a breach by India of its international law obligations under the Convention.

5. RECOMMENDATIONS FOR UPDATING

5.1. Proposals by commentators

The well-respected arbitration expert, Albert Jan Van den Berg proposed twenty years ago that a model law for the enforcement of foreign arbitral awards should be drafted pursuant to article VII (1) of the Convention.[57] This provision allows a party seeking enforcement to rely on the law or treaties concerning enforcement of foreign awards in the country where enforcement is sought. Therefore, even if enforcement is not possible in terms of the Convention, a party may seek enforcement "on the basis of a more favourable domestic law concerning enforcement of foreign arbitral awards".[58] Van den Berg refers to the UNCITRAL Model Law with great approval in this context. He also points out that it is easier to draft a model law outside the Convention than to amend the existing convention.[59]

Ten years ago, Van den Berg further emphasised his view regarding the necessity of updating the international enforcement of arbitral awards regime by compiling a Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards.[60] Of great importance is the well-defined scope of application included in the Hypothetical Convention. Article 1(1) provides that the Convention applies to the enforcement of an arbitration agreement if: "(a) the parties to the arbitration agreement have, at the time of the conclusion of that agreement, their place of business or residence in different states, or (b) if the subject matter of the arbitration agreement relates to more than one state". This description of the internationality requirement is to be endorsed and it is in line with various other UNCITRAL Conventions' description of the concept, most notably also the CISG. Article 1(2) of the Hypothetical Draft states that the Convention also applies to the enforcement of an arbitral award based on an arbitration agreement referred to in paragraph (1). This proper delineation of the scope of application makes it clear that the Convention is to be applied to international arbitration only.[61] This is in keeping with the true purpose of the Convention – to provide a vehicle for recognition and enforcement of cross-border arbitrations. This proposed scope of application clears up any confusion surrounding the "not regarded as domestic" phrase in the current New York Convention, since it clearly applies to any international arbitration, regardless of the place where the award was made.[62] Furthermore, in the Hypothetical Convention, the refusal of referral of a dispute to arbitration on the grounds of public policy is restricted to grounds of "international public policy as prevailing in the country where the agreement is invoked".[63] Van den Berg proposes adding a ground for the refusal of referral, namely that "the other party has requested referral subsequent to the submission of its first statement of substance of the dispute in the court proceedings".[64] Furthermore, Van den Berg's Hypothetical Convention does not allow for contracting states to make a reciprocity or commercial reservation.[65] The deletion of these reservations is certainly to be supported in the pursuit of harmonised interpretation and application of the Convention. Van den Berg argues that form requirements for the arbitration agreement are superfluous in modern times.[66] He points out that the current New York Convention contains no conflict rule on determining the law applicable to the arbitration agreement at the referral stage.[67] He supports the application of the *lex arbitri* in this regard. Also, he proposes that arbitrability not be set as a separate requirement for referral, but be taken up in the public policy ground, and that the latter be limited to international public policy.[68] In respect of the enforcement of the award (draft article 3), van den Berg proposes that conditions be limited to those contained in the draft Convention.

57. Van den Berg A "Striving for uniform interpretation" in *Enforcing Arbitration Awards under the New York Convention. Experience and Prospects* 1999 (United Nations, New York) 41 at 42.
58. *Ibid.*
59. *Idem* at 43.
60. Van den Berg A AJB/Rev06/29-May-2008 and Van den Berg A "Explanatory Note to the Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards", available at http://www.newyorkconvention.org/11165/web/files/document/1/6/16015.pdf (accessed 1 November 2018).
61. Van den Berg "Explanatory Note" 4.
62. Van den Berg "Explanatory Note" 5.
63. Van den Berg Hypothetical Convention article 2 (2)(c).
64. Van den Berg Hypothetical Convention article 2(2)(a).
65. Van den Berg "Explanatory" Note 6.
66. *Idem* at 9.
67. *Ibid.*
68. *Idem* at 12.

Furthermore, his draft article 3 states that the law of the country where enforcement is sought, shall govern the procedure for enforcement but that no onerous procedural requirements nor substantial fees be imposed for such and that courts have the obligation to act expeditiously in the enforcement of an arbitral award. Van den Berg proposes more or less the same grounds as the current New York Convention for refusal of enforcement, he merely redrafts some of the formulations in this regard.[69] However, he proposes that courts not be allowed a residual discretion to enforce the award if one of the listed grounds are present, but that "enforcement *shall* be refused on the grounds set forth in this article in manifest cases only".[70] The rest of his proposals are relatively compatible with the current Convention text.

Veeder argues that the New York Convention does not provide for the enforcement of an arbitral tribunal's provisional and conservatory measures abroad.[71] He recommends a supplementary convention on the enforcement of an arbitral tribunal's interim measures of protection by state courts.[72] He advances several reasons for this need, the most important being that an interim order, like an arbitral award, is not self-executing and that arbitrators "lack the sanctions of state courts for the enforcement of their orders".[73] However, he is also vehemently opposed to the amendment or redrafting of the New York Convention and advocates for interpretative aids to the Convention to be updated and reinvented.[74]

Paulsson advocates that the current New York Convention should be replaced by two conventions.[75] The primary convention would be applicable in the country where the award was rendered and contain provisions tailored to the position where the award is to enforced (or set aside) at the seat of the arbitration. The secondary convention would be applicable in countries where enforcement is sought.[76]

Melis once again echoes the sentiment that it is not advisable to amend the Convention, since this would possibly create confusion.[77] However, he also supports the notion of introducing a convention complimentary to the New York Convention to deal with matters that were not and could not have been envisaged at the time of drafting same.[78] Under such matters, he includes, first and foremost, the writing requirement. He highlights the fact that means of communication have changed drastically over the years.[79] He advances the argument that the definition of "agreement in writing" should be broadened in light of the definition in the UNCITRAL Model law to include all means of communication which can be evidenced in text. He provides article 178 of the Swiss Private International law Act as an example of such.[80]

Finally, Arfazadeh's interpretation of the Convention in respect of arbitrability warrants mention. He argues for the following interpretation in respect of determining arbitrability:

> "For purposes of article II, the subject matter of the dispute is capable of settlement by arbitration unless the court seized of an action on the merits determines that, under the laws of the forum, it has mandatory jurisdiction over the dispute, to the exclusion of arbitration. For the purposes of article V(1)(a), the non-arbitrability of the subject matter cannot constitute a defence to the enforcement of an award. For the purposes of article V(2)(a), recognition and enforcement of an award may be refused only if, under the laws of the forum, the subject matter of the dispute is expressly reserved to the mandatory jurisdiction of a national court or authority, to the exclusion of arbitration".[81]

5.2. Proposals by present author

The New York Convention is sixty years old – it has stood the test of time, but inevitably it has also aged. Technological and other advances have been made in the last sixty years that the drafters of the Convention could not have ever foreseen sixty years ago. It

69. See Van den Berg Hypothetical Convention article 5
70. Van den Berg Hypothetical Convention article 5(2).
71. Veeder V "Provisional and conservatory measures" in *Enforcing Arbitration Awards under the New York Convention. Experience and Prospects* 1999 (United Nations, New York) 21. This shortcoming is also pointed out by Lebedev in "Court assistance with interim measures" in the same publication at 23-24 and Hermann "Does the world need additional uniform legislation on arbitration?" (1999) 3(13) *Arbitration International* 211 232.
72. Veeder 21.
73. *Ibid* at 22.
74. Veeder V "Is there a need to revise the New York Convention?" (2010) 1(2) *Journal of International Dispute Settlement* 499 at 504.
75. Paulsson M "The 1958 New York Convention from an unusual perspective: Moving forward by parting with it" (2017) 5 *Indian Journal of Arbitration Law* 23.
76. Paulsson (2017) 36.
77. Melis W "Considering the advisability of preparing an additional Convention, complimentary to the New York Convention" in *Enforcing Arbitration Awards under the New York Convention. Experience and Prospects* 1999 (United Nations, New York) 44.
78. *Ibid.*
79. *Ibid.*
80. *Ibid.*
81. Arfazadeh H "Arbitrability under the New York Convention: The *lex fori* revisited" (2001) 17(1) *Arbitration International* 73 87.

is suggested by the present author that Veeder's suggestion of a supplementary convention may be more expedient to address the current inadequacies and shortcomings of the New York Convention. It would be far easier to promote accession to a supplementary convention than to get immediate approval from all current contracting states to modify the current convention. Certain authors, and, most notably Veeder, are vehemently opposed to updating or redrafting the current New York Convention's text itself, arguing that such a process will result in endless UNCITRAL meetings and working groups and produce a far too long Convention that would not be nearly as effective as the current version.[82] The adoption of a protocol to the current New York Convention on its interpretation may also address current gaps and shortcomings or even new developments not foreseen by its drafters. The present author would recommend the following provisions or clarifications be included in an interpretive protocol to the New York Convention:

c. In respect of the arbitrability requirement in art I(3), the applicable law should be clarified in order for the scope of application of the New York Convention to be better defined. Arfazadeh's interpretation as mentioned above has much to commend itself.

d. The writing requirement under article II(3) should interpreted broadly to include all arbitration agreements that may be evidenced in some form of writing.

e. The reciprocity and commercial reservations should be actively discouraged and contracting states that availed themselves of these reservations should be urged to withdraw them.

f. The grounds for refusal of recognition should be interpreted restrictively and in light of the Convention's purpose of facilitating international trade by providing for an effective dispute settlement regime.

6. CONCLUSION

It has been pointed out that the empirical evidence available suggests that enforcement rates under the New York Convention are excellent.[83] Furthermore, arbitration "is likely to remain the common method of resolving commercial disputes arising from cross-border trade and investments".[84]

Perhaps one of the most convincing arguments relating to the success of the New York Convention as a framework for the recognition and enforcement of foreign judgments is found in an introductory statement in the UNCITRAL Secretariat Guide to the Convention, where there is made reference to the fact that a wide range of decisions on the New York Convention are collated in the Guide and that "despite the diversity of the Contracting States' legal systems, the interpretation and application of the Convention has been rather consistent and in conformity with the Convention's policy of favouring recognition and enforcement".[85]

It has also been stated that "the New York Convention is the lubricating super-oil for the complex machinery which has made the explosion of global trade possible over the past fifty years".[86]

Though effectiveness of arbitration is often measured by "the likelihood of achieving a readily enforceable award",[87] "the most desirable arbitration is one that promises to be both fair and efficient, at the end of which timely compliance by the award debtor without the need for subsequent enforcement actions is likely".[88]

The sentiments raised by commentators in respect of a supplementary convention, or, perhaps less ambitiously, the adoption of an interpretation protocol to the current New York Convention is supported. Redrafting or replacing (in its entirety) a Convention with such a vast number of contracting states would be impracticable and would raise questions of applicability

82. Veeder (2010) at 505.
83. Tannock Q "Judging the effectiveness of arbitration through the assessment of compliance with and enforcement of international arbitration awards" (2005) 21 (1) *Arbitration International* 71 72.
84. *Ibid.*
85. UNCITRAL Secretariat Guide 4.
86. Veeder, "Is there a need to revise the New York Convention?" (2010) 1(2) *Journal of International Dispute Settlement* 499 at 500.
87. Tannock (2005) 75.
88. *Ibid.*

of the two conventions, transition provisions, compatibility provisions and so forth.[89] None of these suggestions would promote the goals of international commercial arbitration.

It has been suggested that the compilation of evidence of widespread "spontaneous compliance with arbitral awards would do much to improve confidence in the effectiveness of international commercial arbitration".[90] Tannock argues that academics, arbitration institutions and international research organisations could elaborate to conduct empirical studies of the ultimate fate of arbitration awards.[91] Though refusals of enforcement applications are often regarded as negative, it needs to be borne in mind that often such refusal decisions by courts are positive in the sense that they indicate that poor or unsound arbitral awards will not be tolerated. This improves confidence in arbitration as a dispute settlement option. The grounds for refusal of enforcement as listed in the New York Convention are exhaustive and not too broad, but sufficient to ensure fairness.

It has been suggested that many final international commercial arbitration awards are voluntarily complied with. If this may be empirically demonstrated, it would improve user confidence in the system of international commercial arbitration.[92]

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89. Paulsson (2017) 25.
90. Tannock (2005) 76.
91. *Idem* at 79.
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