The Eve of the New York Convention's 60th Anniversary and the Birthday Party: How to Prepare with too Many Guests at the Table. "Il ne faut pas melangér les tables"

Kluwer Arbitration Blog
June 21, 2018

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Please refer to this post as: Marike R. P. Paulsson, 'The Eve of the New York Convention's 60th Anniversary and the Birthday Party: How to Prepare with too Many Guests at the Table. "Il ne faut pas melangér les tables" ', Kluwer Arbitration Blog, June 21 2018, http://arbitrationblog.kluwerarbitration.com/2018/06/21/eve-new-york-conventions-60th-anniversary-birthday-party-prepare-many-guests-table-il-ne-faut-pas-melanger-les-tables/

What Is the Future of the New York Convention as a Primary Means for Enforcement of Arbitral Awards Across the Globe? Is There Any Future at All?[fn]UNCITRAL will be having several celebrations in June. At these occasions, thought leaders will reflect on the last 60 years and give their prognoses on the next 60 years. However, the views are on extreme sides of the spectrum with some proposing for complete overhaul whilst others abide by the adagio: if it ain't broken, don't fix it.[/fn]

The year 2018 has featured many conferences and publications celebrating the 60th year that the New York Convention has been in existence, and with that, the question has been posed, as it had ten years ago at the occasion of its 50th anniversary at the ICCA Congress in Dublin: Does the treaty need replacement? The answers have been multiform since:

1. One extreme answer on the spectrum: The New York Convention has been showing its cracks and needs replacement due to 60 years of divergent interpretation in the different 159 Contracting States.[fn] The replacement of the New York Convention has been proposed by Albert Jan van den Berg and has been dubbed the Miami Draft. The Draft has been discussed by the author in an earlier post.[/fn]
2. The other side of the spectrum suggests: The New York Convention has been hailed around the world by thought leaders as the most successful instance of international law in the history of international commerce. It has even been proposed to be given the Nobel Prize, or at least its father – Piet Sanders and, in the alternative the organization that has been monitoring its existence, the International Council for Commercial Arbitration.
3. A more moderate, yet realistic point of view: The New York Convention works, but it requires various instruments of soft law in order to assist judges in applying its text in the domestic realm.
4. A more moderate, yet acceding view: The New York Convention will continue to promote international arbitration whilst being monitored by UNCITRAL.

Being on extreme sides of the spectrum at roundtable discussions with thought leaders has brought me to the use of the phrase – "Il ne faut pas mélanger les tables".[fn]A French expression often used

at wedding table seating advising the naïve bride to be not to mix the tables but to seat like-minded people with like-minded people.[/fn] Some tables do not need controversy leading to great conversations. Sometimes, a common path must be found for stakeholders to reach consensus about a treaty that has enabled the flourishing of international arbitration *and* international trade.

Perhaps the New York Convention ought to be a living breathing document like the US Constitution. Perhaps the original purpose or intent of the drafters was not for the treaty to be applied in a uniform manner in every single Contracting States for decades to come. Perhaps the New York Convention does not need replacement, yet it needs some hip or knee replacements such as the Global Restatement, or official recommendations issued by UNCITRAL or a policy guide for both executive and legislator by ICCA. Or perhaps the application of the New York Convention over the last 60 years has taught us that something far more radical is required than a replacement. Given the outcomes of the application of setting aside regimes in the countries where the award was rendered, perhaps the time has come again to pose the question as to whether setting aside regimes should be abolished.[fn]For the idea of revisiting the New York Convention and domestic setting aside regimes, please see here.[/fn]

To these possible outcomes, I would add the following three pivotal developments that ought to be taken into account when finding a common path:

1. First, the idea that international arbitration will continue to be the preferred method of dispute settlement in international trade is under revision both in the realm of international commercial arbitration and international investment arbitration. It is subjected to harsh criticism both from the arbitration community and from users, often citing costs and duration as a potential downfall.
2. Second, the New York Convention is being currently presented with a mandate that was not even remotely considered 60 years ago: to be the enforcement mechanism for 'awards' rendered by a permanent court envisioned by the European Union.
3. Third, perhaps Pieter Sanders was the first to think of mediation as one of the important topics in the future of dispute resolution back in 2010. But since then, the proponents of mediation have taken center stage and are making progress; thus, leading us back to the – perhaps original – idea of alternative dispute resolution. This idea was that first parties ought to attempt to settle any disputes through direct negotiation. If those attempts fail, parties can resort to what one could coin as third-party assisted settlement, which could be conciliation, mediation or commercial diplomacy (the latter I would coin as Dispute Resolution Diplomacy "DRD"). With that, the New York Convention loses its relevance: it is no longer just the successor of the Geneva Conventions. On the basis of Article VII(2), perhaps the New York Convention was less favorable than the European Convention of 1961, but otherwise, it continued to be celebrated at important milestones. Now, a new convention is underway: the United Nations Convention on International Settlement Agreements [resulting from mediation]. Is this to be the twin sister of the New York Convention?

Admittedly, 60 years with the commitment of 159 States gives a lot to celebrate. Yet, it is time for reflection about (partial?) replacements, additional reading glasses, crutches to enable the treaty to last another 60 years. Alternatively, the treaty could gradually phase out with the rise of third-party assisted settlement as the new way forward for dispute settlement in international trade (with the use of a probable Mediation Convention). Even if mediation will only supplement the 'stick' – international arbitration – the question remains what the role of the New York Convention will be when the idea of international arbitration will change fundamentally. If the EU is to move forward with its permanent court, the New York Convention will most likely not be the treaty under which those awards can be enforced.[fn] The community seems to be confident that the Convention can serve as the enforcement mechanism for any awards coming out of this court. I disagree. The awards of the court

will most likely not fall under the scope of Article I(2) of the New York Convention as the *travaux preparatoires* demonstrate.[/fn] George Bermann states that "what emerges from the court will not be arbitration awards and thus the future – should the proposed EU investment court come into existence – could spell an end for the role of the New York Convention in European investor-state cases".

Of course, most awards to be enforced under the New York Convention are commercial arbitration awards, for instance, those rendered under the auspices of the ICC. Even so, recent case law demonstrates judicial freestyling with some faint memory of the New York Convention. It is not all doom and gloom: institutions have embarked upon admirable journeys to shepherd judges across borders through the fog that has enveloped the text of the New York Convention. The International Council for Commercial Arbitration was created by Piet Sanders and his peers at the occasion of the conclusion of the European Convention of 1961. Piet Sanders then created the ICCA Yearbook with the purpose of monitoring the application of the New York Convention. That Yearbook has published over 2500 decisions to date. ICCA proceeded to write and distribute the ICCA Guide for the judicial interpretation of the New York Convention in 2011, a guide translated in 20 languages and distributed worldwide for free. In 2012, it embarked upon NYC Roadshows, which has led to certain States signing on to the New York Convention. The work has been done. The work continues to be done by UNCITRAL and ICCA. The work remains to be done. Powerful soft law must be developed; a dialogue must continue to take place with judiciary, legislators and executive and with all stakeholders in the community of international arbitration but also and especially with the actors in international trade.

Proposals? The community should continue to reflect on the Miami Draft, as a suggested replacement for the New York Convention, for the simple reason that it leads to ideas that could be effectively implemented: a Harvard Draft, a Global Restatement, a Supplementary Commentary, the possibilities are countless when mapping the future.

I would compare the Miami Draft metaphorically to the impossible dream of the Man of La Mancha.[fn] As referenced by Fali Nariman in his speech in 2013 in Delhi on sovereignty.[/fn] From the time of Yukos v. Russia to Pemex, notions of sovereignty have collided like billiard balls and gone in opposite directions and given the current nationalist waves, it will get worse. I would symbolically compare modern day enforcement as a never-ending Russian Doll of proceedings before numerous forums – all at the cost of predictability. However, the proposals are there and provide ways forward so one can end this note in times of geopolitical turmoil and the PR crisis of international arbitration with the one thing we do well to remember: international law has perhaps not achieved much, but it is good that it is there.