Kluwer Arbitration Blog

The Miami Draft: the Good Twin of the NYC*

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"The initial response thereto was: 'if it ain't broken don't fix it'. A new Convention was viewed as unrealistic, and the point was made that the key may not be the text, but judicial comprehension of the transnational process, and the purpose and objectives of the NYC. A year later, in Miam…"

**The Miami Draft was originally called 'the new NYC: a hypothetical draft' by its drafter Albert Jan van den Berg, subsequently dubbed 'the Dublin Convention' at the occasion of the ICCA conference in Dublin 2008 and finally, echoing the influential 1961 "Harvard Draft" on the responsibility of States, renamed 'the Miami Draft' when re-presented by the author in Miami on 31 October 2009 at the conclusion of a conference entitled "The New York, European, and Panama Conventions."*

New York 1958: 'Vivat, Floreat et Crescat the New York Convention.'[1)] One can indeed but applaud the success of the NYC.[2)] Credit goes to a multitude of judges around the world who have applied the NYC so loyally.[3)] Yet, cracks have become visible over the last 52 years. Is there a need for a new Convention? If so, wouldn't a new Convention, if possible at all, make things worse? Would it not be preferable to have a new interpretation instrument to enhance uniformity?

Current interpretation mechanisms of the NYC are varied,[4)] and unfortunately divergent in outcomes.[5)] We are far from a uniform interpretation. The textual imperfections of the Convention have come to light in courtrooms around the world. Of course, there is no such thing as a perfect Convention. The drafters of the Convention in 1958 could never have been able to produce a text that would foresee the issues which we confront in 2010, no more than the founding fathers of the US Constitution could have anticipated the world wide web. How could the original drafters of the NYC have predicted a worldwide multiform interpretation of the Convention? That would be as if one would have expected an IT expert in the year 1958 to be capable of providing an analysis of

the Blackberry.[6] At the occasion of celebrating the Convention's 40th birthday, its founding father Pieter Sanders remarked: 'nothing is perfect in this world. After 40 years of practice with the Convention its text could certainly be improved.'[7] However, an amendment to the Convention is most likely not possible, nor will a Protocol or second Convention be desirable.

At its 50th anniversary in Dublin 2008, at the occasion of the ICCA conference, the success of the NYC was assessed, yet again. But cracks in the text were also identified. For example, a number of provisions in the text is unclear, such as the definition of award 'not considered as domestic' (article I(1)) or the expression 'duly authenticated original award' (article IV(1)(a)). The most ambiguous is perhaps the infamous word 'may' in article V (1). But there are more, e. g.: 'terms of submission to arbitration' and 'scope of submission to arbitration' (article V (1)(c)), the notion of a 'suspended' award (article V(1)(e)), 'any interested party' (article VII(1)).[8]

A proposal was launched for a new NYC, 'the hypothetical draft for a new NYC', dubbed the Dublin Convention.[9] Conservatively, the consensus was to obtain uniform interpretation by improving current interpretive patterns rather than attacking the text of the Convention itself: thus, ICCA will present its judges'guide for the interpretation of the NYC at the celebration of ICCA's 50th birthday on 20 May 2011. For a more in depth analysis and doctrine one will have to defer to the upcoming second edition of the treatise on the NYC.[10] Some think a second edition of that treatise on the judicial interpretation of the NYC resolves the unresolved ambiguities of the current text of the Convention rather than thinking about the text itself:

> Dr van den Berg's proposals in Dublin were well considered and admirably formulated; but they condemned themselves: all of them are essentially capable of resolution by treaty and legislative interpretation without requiring any actual change of wording in the text of the NYC. Moreover, this rational approach could most easily be established by Dr van den Berg finishing his belated and much needed second edition; and one practical proposal would be for us to raise a special fund to persuade him and his assistants to do so as soon as possible on a remote island, free of any other distractions, like Bali, or even England since the recent fire in the Channel Tunnel.[11]

Yet, guides, recommendations and treatises cannot serve to resolve its ambiguities as effectively as a new and precise articulation of propositions – think of Dicey and Morris in the field of conflicts of laws, the Harvard Draft on state responsibility, and more recently Zachary Douglas on investment treaty arbitration. Thus, the Miami Draft serves as a manual of "best interpretive practices" intended to remedy ambiguities and judicial disharmony. It is like a magical mirror that offers a face-lift without surgery, gently reworking the defects that decades of use have revealed in the old syntax. The purpose of the Miami Draft is of course that of the NYC itself, and nothing else: to facilitate the recognition and enforcement of foreign arbitration agreements and arbitral awards. The proposals in the text are clear and simple and based on current practices.[12] Rather than having an academic debate, it proposes rules. The Miami Draft imagines articles of the NYC, the way one would have drafted them in 1958 with today's knowledge. The Compare Table provides for the current text on the left hand side (the NYC) and the way to actually read it on the right hand side (the Miami Draft).[13] The right hand side resolves questions such as 'how should I read and understand 'may' (article V(1))? The intention of the original drafters and the lessons of current

practice suggest preferred outcomes, and a decrease of judicial unpredictability. Take the word 'may' which so notably complicates understanding of article V(1)(e). The Miami Draft uses the word 'shall', and then goes onto provide a solution between the two extremes: refusing enforcement of any award that has been annulled in its country of origin irrespective of grounds therefore, and, totally ignoring an annulment elsewhere, à la française (outside the NYC, via article VII).[14] The Miami Draft adopts the solution of the European Convention, article IX (2), thus preventing the enforcement of awards annulled on the basis of local standards as opposed to international standards (the so-called distinction between LSAs and ISAs). As far as article II is concerned, the Miami Draft goes a step further: it disposes of requiring the arbitration agreement to be in writing. This requirement is almost stricter than any arbitration law.[15] In this respect, the Miami Draft goes back to the wish list formulated at the NYC's 40th birthday, the elimination of the written form requirement being one of the points on that wish list. These wishes can ultimately come true through the mechanism of article VII, the more favorable right provision which enables parties to fall back on national laws if and when the latter progress beyond the advances – such as they were — made by the NYC half a century ago.

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