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## Interpreting the New York Convention under the Vienna Convention from a National Perspective: Paulsson Snail Diagram, a Judges Tool

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The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“The New York Convention”) is an international instrument: a treaty between 156 States. It is interpreted on the basis of the Vienna Convention on the Law of Treaties (“The VCLT”). The VCLT is further defined in this post with a useful tool for judges: the Snail Diagram.

### The three pillars of the VCLT

The VCLT codifies international customary law on the interpretation of treaties in three core articles: 31, 32 and 33. This post attempts to dissect the first two pillars: 31 and 32. (For Article 33, see Marika Paulsson, *The 1958 New York Convention in Action*, Kluwer Law International 2016, p. 47) The method is simple, at least in theory: first, Article 31 provides that the trilogy of text, context and purpose is applicable when interpreting a treaty. Here, logic prevails as the drafters of the VCLT assume that the drafters’ intent is reflected in the final text of a treaty. To go behind the text immediately upon reading that text and second-guess what the drafters really wanted to say leads to a kaleidoscopic version of any treaty text.

The second part of the trilogy: context. No word should be read out of context. Again, logic prevails. Reading a treaty provision within the context of the entire treaty leads to a better good faith-understanding of a treaty. Finally, the provision must always be read bearing in mind the purpose of the entire treaty: for the New York Convention that is the contribution to the effectiveness of arbitration. (See Marika Paulsson, *The 1958 New York Convention in Action*, *Kluwer Law International* 2016, p. 13; *Convention on the Recognition and Enforcement of Foreign Awards, Travaux Préparatoires – Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, ¶ 16, at 5, U.N. Fov. E/Conf.26/8/Rev.1 (1958)).

The VCLT instructs the interpreter to rely on the ‘ordinary meaning’ of a text (Article 31). The trilogy of text, context and purpose in its ordinary meaning glossed by good faith is the first port of call, what I call the primary elements. The New York Convention’s drafting history, the *travaux préparatoires*, may be relied on the basis of Article 31 (the primary elements) only to confirm the meaning derived from the text, context and purpose. The drafting history may be resorted to in order to establish the meaning if the outcome under Article 31 ‘leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable’ (Article 32). The drafting history is what I call the ‘secondary elements’.

## From Huber's "Encerclement Progressif" to the Paulsson Snail Diagram

Encerclement Progressif: the text is departed from only gradually, in concentric circles, proceeding from the central to the peripheral. (Jimenez de Arechaga, 'International Law in the past Third of a Century', 159 *Recueil des Cours* 1 (1978) at 43.)

The text-purpose-context trilogy in conjunction with the drafting history is clearly set out in Articles 31 and 32 of the VCLT, yet in practice it is hard to know when to rely on which source: Articles 31 and 32 need interpretation themselves. Article 31 does not stop with the trilogy of text, context and purpose because 'context' includes not only the other provisions of the treaty. It also includes: any agreement related to the treaty between the parties (i.e. the Contracting States), any instrument made by one or more parties in connection with the conclusion of the treaty, any subsequent agreement between the parties, any practice that is equal to an agreement, and relevant rules of international law. There could also be a special meaning that the parties wanted to give to a term. A whole extra list of interpretation tools is thus added to the primary elements. When does a court proceed from the trilogy to agreements and practices? The Snail Diagram enables a judge to start in the Snail's core, where the trilogy is found. Only if more additional tools are needed, can the judge descend from agreements to practice and, finally, to the rules of international law. The line between the primary and secondary elements is only crossed to go to the drafting history in the case of ambiguity or unclarity.



### Transplanting the VCLT's rules to the national space

How can the Snail Diagram, using the interpretation elements of Articles 31 and 32 of the VCLT, be used in the national space? Most Contracting States make the New York Convention part of their national law through implementation, morphing an international creature into a national framework. What then is the role of the VCLT? Aligning statutory interpretation with treaty

interpretation. How? Through a three step process.

First, a court must bear in mind that the enactment finds its origin in international law. Second, a court must remember that Articles 31 and 32 are merely a codification of international customary law. Third, with the New York Convention being enacted often *ad verbatim* and with statutory and treaty interpretation both focusing on the text, courts can rely on the primary elements and focus on the international roots when using the secondary elements:

Treaties are construed in much the same manner as statutes. Statutory construction is a holistic endeavor and must account for the statute's full text, language as well as punctuation, structure and subject matter. (Lucas Lancaster, Inc. v. Lark International Ltd. 186 F.3d 210 (2nd Cir. 1999), in Yearbook Commercial Arbitration XXIV (1999) (US no. 287), at 900-08, ¶¶ 6-9.)

In the end, the reality is that courts rely on the VCLT. They just do. That judicial practice, and the fact that the New York Convention in action operates in conjunction with the VCLT, is one of the main reasons why the New York Convention does so well. However, how courts rely on the VCLT is not clear. Most judges are not entirely at ease with international law and the VCLT because they do not apply it every day. Their contribution to the successful application of the New York Convention was therefore remarkable. Still, the use of the VCLT's Articles 31 and 32 has been inconsistent and nontransparent. Hopefully, the Snail Diagram will make the use of the VCLT easier and thus lead to a more consistent and transparent use of the VCLT and, consequently, to a uniform application of the New York Convention.

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