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The Future of the New York Convention in Its Most Extreme Sense: A Dual Convention that Disposes of National Setting Aside Regimes

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The New York Convention's 60th Anniversary renewed the debate about its future.

One must recognize that a treaty that is sixty years old and has been ratified in almost 160 countries can no longer be replaced. Even with compatibility clauses, provisions that would provide for retroactive application and the other tools that the Vienna Convention on the Law of Treaties gives to States to become a party to a new treaty, one cannot assume that yet again 160 States would sign on to the New York Convention's replacement. Even if the text of the New York Convention is pathological at times, it is so not because the expert drafters made substantial errors, but because the drafters were not experts in international arbitration and enforcement of awards. They were delegates representing the sovereign interests of their countries. Often provisions of the treaty were a mere agreement to disagree. One must remember: the treaty is ultimately built on the idea of sovereignty. A new treaty will be the same.

Yet, it is time to reflect on what a replacement could look like because that would enable judges to understand the original idea and purpose of the treaty and strive toward a uniform application.

The decision that has sparked a debate about the New York Convention and how far courts can go when deciding to declare awards enforceable even when another court had set aside the award, was the *Pemex* decision [1)]. With that, questions of international comity, the role of the courts and public policy under Article V(1) of the New York Convention become relevant again after sixty years after its inception. National setting aside regimes must be addressed: Should they be abolished?

Setting aside and enforcement are based on similar grounds. The setting aside grounds are often recycled in the enforcement procedure. The difference is that, with the annulment, the court that will assess the grounds is versed in *lex arbitri,* whereas the court enforcement court is not versed in *lex arbitri*. The time it would take to get from the filing of the request for arbitration to the ultimate decision by the highest enforcement court could counter the supposed advantage of arbitration – speed. The layers and the Russian Doll effect have put to question Article V(1)(e) and also Article V(1) in general: Would it be for courts of enforcement to assess the enforceability of an award when most of the refusal grounds are engrained in *lex arbitri* not *lex fori*? [2)].

I will not be addressing the practical steps and hurdles to replacement of a treaty in this post, let

alone the (im)practicalities of amending national setting aside legislation [3]. I will simply think of an ideal structure that sets out the journey of an arbitral award once it has been rendered. As a theatre play, Act II after the intermission, an award once rendered perhaps means that a dispute has been adjudicated by a competent tribunal. Yet, *lex arbitri* equally gives the courts of the country where the award was rendered competence to dispose of that award. It is part of Act II. What is also part of Act II is the subsequent enforcement. Often, a setting aside procedure and enforcement procedure happen simultaneously. Where the enforcement is a natural consequence of rendering an award, a setting aside procedure is as well – parties to the arbitration had agreed to it. Perhaps, that safety net was deemed necessary, given that arbitration is entirely contract based and in a sense unregulated. But does it make sense?

The new structure would be a Dual Convention that would do away with national setting aside regimes and leave the assessment under *lex arbitri* to courts of the seat only: the courts versed in *lex arbitri.* The new Convention would consist of the Primary and Secondary Convention. The Primary Convention grants the successful party the right to seek a recognition title in the country where the award was rendered. That court will not have to decide on any setting aside request. The court will assess whether there had been a violation of due process under the laws of the seat (*lex arbitri*), whether there was a valid arbitration agreement, whether the mandate was complied with, whether the procedure was in accordance with the arbitration agreement or *lex arbitri*, and whether the award is binding on the basis of the *lex arbitri.* Thus, multiple courts of other countries are not asked to assess these factors under *lex arbitri,* a law that they are not familiar with. The courts of the seat can no longer invoke local public policy to set aside the award. Stopping of the enforcement is based on *lex arbitri,* a law chosen by the parties based on party autonomy. The latter is a pillar of international arbitration and of the New York Convention. The multiple layers are removed as there is no setting aside to stop enforcement.

The Secondary Convention would be applied in all the countries where enforcement is sought. Those courts would no longer make use of Article V(1). They can only apply Article V(2), i.e. the public policy of the country where enforcement is sought. The successful party can request the enforcement title in the country where the award was rendered with the respondent only being able to resist on the basis of Article V(1) and the successful party can then take that enforcement title to 159 Contracting States where the only hurdle to face would be public policy under Article V(2). Article V(2) cannot be eliminated altogether as it encompasses another important pillar of the current New York Convention, one that States would never surrender, and that is sovereignty.

The advantage of this structure is that the layer of setting aside is removed from the contestation phase and only the court of the seat will address the questions under Article V(1), which are predominantly based on *lex arbitri*. This one-stop process then leads to an approval or rejection of the award by one court of one jurisdiction which must be respected by other States. The successful party has more hopes for a proper assessment under Article V(1) by the courts of origin. It is thus a treaty that respects the idea of international arbitration, party autonomy, and *lex arbitri,* with a sovereign public policy boundary at the forum only.

Why should we think about a new Convention if it is never going to happen? Because it raises awareness with respect to the fact that although the New York Convention operates in 159 States, its outcome is not uniform, it is rather very fragmented – with judges having vast powers to interpret its text in various ways, and this leads to legal uncertainty.

This dialogue might lead to UNCITRAL creating a working group to craft further

recommendations for the enforcement of awards worldwide. It might lead to the ICC establishing a Special Task Force with the users of international arbitration to confront the outcomes under Pemex.

Complacency does not lead to progress. The exercise of contemplating a new convention to replace a treaty that is over sixty years old enables the actors in international law to think of improving the procedures for enforcement of awards worldwide. One hopes that exercises such as these and the idea of what a better treaty could have looked like will lead to a different judicial lens globally.

References

?1 Marike Paulsson, Comissa v. PEMEX the Sequel: Are the Floodgates opened? The Russian Doll Effect further defined, Kluwer Arbitration Blog (August 11, 2016)

?2 Marike Paulsson, Comissa v. PEMEX the Sequel: Are the Floodgates opened? The Russian Doll Effect further defined, Kluwer Arbitration Blog (August 11, 2016); See also Albert Jan van den Berg, Should the setting aside of the Arbitral Award be Abolished?, 29(2) ICSID Rev. 1, 1-26 (2014)

?3 Marike Paulsson, The Indian Journal of Arbitration Law, National Law University, Jodhpur, India: "The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards from an unusual perspective: moving forward by parting with it."

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