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General Editor: Emmanuel Gaillard

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Is There a Need to Revise the New York Convention

Key note speech

V.V. Veeder *

I have been asked to address tonight the question whether the 1958 New York Arbitration Convention should be amended by the United Nations. You might well wonder at the relevance of this question to an audience predominantly concerned tomorrow with the ICSID Convention, operating independently from the New York Convention, State courts and national laws. For two reasons, however, we must now look to the future of all forms of transnational arbitration.

First, does ICSID have any future, with States from Bolivia to Venezuela denouncing the ICSID Convention? Does it remain only for the rest of the alphabet to be joined up for the ICISD Convention to become a dead letter? Of course, we all here know that ICSID does indeed have a fine future; and it would be odious for anyone even to raise any doubts about that future, particularly on a candle-light occasion like this. It is just that we do not quite know, yet, what that future may be. The World Bank and ICSID work often in mysterious ways; and never more so than now. In any event, investment arbitration will always be more than ICSID arbitration, as it was before the ICSID Convention; and also, as we fear, the ICSID Convention, as enacted by many States, may not apply to non-monetary ICSID awards. And so, on any view, the New York Convention remains and will remain relevant to

* Essex Court Chambers.

investment arbitration; and it certainly remains important to international commercial arbitration.

The second reason is more personal. In a brave attempt to delay writing the second edition of his great work, now more than twenty-five years old, my friend and name-sake Professor van den Berg, as we heard him at the recent ICCA Congress in Dublin, is agitating with conviction for a thorough revision of the New York Convention, both within and without the UNCITRAL Working Group on Arbitration. His troops in Dublin were routed by Maréchal Gaillard,¹ but, like Napoleon, a new army is being assembled for the decisive battle. Will it be Austerlitz or Waterloo? It would, of course, be odious to say which was which here.

For some, as encouraged by Dr van den Berg, the major criticism is that the New York Convention is far too short, incomplete and uncertain for a modern treaty. It comprises only sixteen articles, of which only three are critically important: Articles II, V and VII.²

President Wilson's 14 points were all critically important; but President Wilson failed as a statesman, as we know, because his points were too short. If only President Wilson had submitted

¹ See Catherine Kessedjian, *En revenant de Dublin : l'éventuelle réforme de la Convention de New York*, 26(3) ASA BULL. 644 (2008); Emmanuel Gaillard, *The Urgency of Not Revising the New York Convention*, in 50 YEARS OF THE NEW YORK CONVENTION, ICCA CONGRESS SERIES NO. 14, at 689 (Kluwer, 2009).

² Dr van den Berg, albeit one of the few numerate arbitrators, disputes this statistical observation. His word count of Articles I to VII(1) of the New York Convention (including the title) is 1025 words, whilst Articles 1 through 7 of the draft 'New' New York Convention (again including the title) comprise only 966 words, a significant downward change of 59 words. Moreover, Dr van den Berg's motto for change ("Yes We Can") has since been widely adopted and successfully applied elsewhere.

more points, it is said, the First World War could have ended with a permanent and amicable peace; and the German Kaiser, the Russian Czar, the Habsburg Emperor and the Ottoman Sultan would have all kept their thrones, without any February or October Revolutions in Petrograd and with the result that today, amongst many other indirect consequences, Georgia would still be Russian with no opportunity for international conflict or illuminating decisions from the ICJ. Accordingly, the historical lesson is, apparently, that the number of words matters: like Mozart's notes, the more the merrier.

Yet others say that long-winded drafting in international instruments, such as we have already seen within UNCITRAL as regards the modifications to the Model Law on Arbitration, does more harm than good. They point to the failures of the European Constitution and the Lisbon Treaty as recent examples. In these texts, they say, there were far too many words, most of them the wrong kind of words; and all of them insufficiently Irish words. So, again, history teaches us that words and the number of words matter.

The controversial nature of our question requires us to look back for guidance to ancient history and other wording far beyond the Lisbon Treaty and President Wilson, because there is simply nothing in modern times to compare to the widespread success and importance of the New York Convention.

Apart from the founding treaties of the United Nations, the New York Convention is the most successful modern treaty measured by the number of its signatory States, 144 independent States. It is the lubricating super-oil for the complex machinery which has made the explosion of global trade possible over the last fifty years. It has been described in extravagant but accurate language by many distinguished commentators all over the world

from very different legal cultures and disparate civilisations, including both English and Scottish specialists.

One English law lord is said to have said, extra judicially, that the New York Convention is both the Best Thing since sliced bread and also whatever was the Best Thing before sliced bread replaced it as the Best Thing. In short, the New York Convention affects directly the lives of billions of people around the world, every minute of every day, in both seen and still more unseen ways. It is therefore a secular, sacred text of the greatest practical significance to every inhabitant of the 21st Century's global village.

With all this in mind, there is obviously only one practical comparison from ancient history, and many of you will have guessed it already, namely: the wording of the Ten Commandments from the Bible's Old Testament.

As we know, Moses came down from Mount Sinai carrying two stone tablets bearing the Ten Commandments. These stones were a kind of supranational treaty independent of any national law, or at least *règles matérielles* free floating in the firmament, a concept so beloved in certain Parisian circles. A pedant might comment that the Ten Commandments were not exactly a traditional multi-party treaty like the New York Convention; but this was long before the Vienna Convention and although the analogy may not be entirely precise, it is nonetheless helpful in addressing, objectively, the question before us this evening in its full historical and linguistic perspective.

There are four particular reasons which make the Ten Commandments a potential model for reform like the New York Convention:

First, not many people know that Moses started his descent with three tablets, not two. The third large stone, much bigger than the other two, contained the explanatory memorandum and the *travaux préparatoires* explaining the object and purpose of each Commandment individually and collectively. We do know that Moses was not then a young man. According to the Bible, he was between 100 and 120 years old. Having climbed to the top of the mountain unaided, Moses had also undergone a religious experience which few human beings had then ever experienced. And so now, laden with three heavy stone tablets, physically tired and emotionally exhausted, Moses began his careful descent down Mount Sinai. But Moses was not careful enough. Juggling the one tablet and the other two from arm to arm as he balanced from rock to rock leaping downhill, Moses managed to drop the third stone, with the result that the Ten Commandments have never been illuminated by any contemporary *travaux* of any kind.³

That is effectively the same problem as the New York Convention. Notwithstanding the splendid efforts of Professor Gaja, the New York Convention is also un-illuminated by any of its *travaux*. On any point of any interest, these *travaux* are quite useless, irrelevant or wrong or a combination of all three. It would have been much better if its *travaux* had all been dumped in the East River.

Like the Ten Commandments, we are therefore left with only the language of the New York Convention, to be read, of course in good faith, in context and in its ordinary meaning or, in

³ The Biblical scholar, Professor Dr M. Brooks, LL.D. suggests that this third stone contained the eleventh to fifteenth commandments: see <http://www.youtube.com/watch?v=4TAtRCJIqnk>. He is incorrect; but he does rightly confirm that this third stone was accidentally dropped by Moses and forever destroyed. (I am most grateful to Klaus Reichert, Esq. and Peter Leaver QC for this obscure reference).

other words, with a reasonable degree of intelligence and common sense.

Second, there is a problem about the ordinary meaning of language when there is an issue about what language. The Ten Commandments were inscribed in Hebrew; but in what language were they originally conceived and drafted in the firmament? Outside this country, few people still believe that God is a Frenchman or at least a francophone; and many now wonder that, if God is not a Frenchman, then God must at least be an Englishman or possibly a Texan or, now even an Alaskan. So, the question arises, which of these four distinct languages did God use to draft the Ten Commandments? And the further question then arises, inevitably, depending on the source language, whether God properly translated the Ten Commandments on the tablets of stone delivered to Moses.

This is equally true of the New York Convention, partly drafted by a Dutchman and translated into the five official languages of the United Nations at a time when the United Nations had no specialist translators for arbitration. So, Article II(2) of the of the New York Convention defines an “agreement in writing” as including an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams. That is the English version. It is also the Russian version (in Russian). However the French and Spanish versions are different and do not use the broad term “include,” apparently limiting an arbitration agreement to a special written form.

The tiebreaker amongst the five official languages should be the Chinese version. However, in 1958, Taiwan sat in the Chinese seat at the United Nations; and its translator was apparently an elderly mandarin scholar, not an arbitration specialist, writing an old form of Mandarin that few if any

understand today, certainly not any of the Chinese friends whom I had to consult in London. It is arguable that the Chinese text can mean “include;” but, on the other hand, it can be argued equally that it cannot. It all depends. And so the British Government, in re-enacting Article II of the New York Convention in its 1996 Arbitration Act was constrained to rely heavily on the English and Russian texts as trumping the French and Spanish versions, in order to produce the peculiar English version of a written agreement made orally in Section 6 of the 1996 Act.

Again, language played its crucial part with the Queen’s printer unused to Russian wording in Cyrillic script. If you look in the official report accompanying the 1996 Act, you will see instead of the Russian word for “include” in Cyrillic, the Russian word for “clavicle” or collar-bone.⁴ It is a sad commentary on the reduced state of the Russian intelligence service that no one has ever noticed this curious error. Or maybe they have; and maybe that is why, having taken deep offence at such linguistic licence, Anglo-Russian diplomatic relations are now so poor. So language matters; foreign language matters; and translations also matter.

Thirdly, there is a problem with the ordinary language of both texts, in whatever language. Let us take, as an example, the Fifth Commandment. The Fifth Commandment would cause us to honour our father and mother. This doubtless made good sense thousands of years ago; but does it make sufficient sense today? Is it an injunction to honour both your father and your mother; or can the word “and” be read disjunctively? And does it require simultaneous ‘honouring’ or can parental ‘honouring’ be discharged consecutively or even alternatively at the will of the honouror. This matters in an age of single-parent families; and it

⁴ The Report on the Arbitration Bill of February 1996, paragraph 34, of the Departmental Advisory Committee on Arbitration Law of the United Kingdom Government’s Department of Trade and Industry (now “BERR”).

will matter with certain adoptive parents and civil unions where there may be two fathers or two mothers. And what of grandmothers and grandfathers: why is 'honouring' so limited? Read literally, without intelligence or common sense, this Fifth Commandment is clearly inapposite to the 21st Century; and some would say that it requires urgent amendment.

There are many other like candidates for re-drafting in the Ten Commandments; and there are many other missing commandments which could be included. For example, where does one find in the interstices of the Sixth Commandment the Bush Doctrine or the need for Second Resolutions of the United Nations' Security Council? And where is the Commandment to vote or to pay taxes or to avoid, whenever possible, printing out email messages?

It is therefore possible to suggest many reforms; but it would be manifestly absurd actually to re-draft the Fifth and Sixth Commandments and still more absurd to start adding further Commandments.

Exactly the same difficulties arise under the New York Convention. In Article V(2)(b), a State court may refuse recognition or enforcement of an award if it would be contrary to the public policy of that country. It has long been very difficult to define such public policy. Many have tried, including the International Law Association, a recent seminar in Stockholm and our own symposium this morning. Whatever other defects a national legal system may have (excepting of course, as we also heard this morning, Switzerland), it is clearly impossible for our national judges to define and apply public policy as a uniform principle to be applied by all State courts, including certain States which it would be invidious to name tonight, few in number but present in Eastern Europe, Asia, the Middle East, Sub-Saharan Africa and Latin America. This is a large area with a large

proportion of the world's trade and, more significantly, State judges deciding cases under the New York Convention.

We know that certain of these States invoke public policy as a pretext and not as a true reason not to enforce an award under the New York Convention. Any re-draft of this Article V(2)(b) could therefore achieve nothing: another pretext would be found by these States to the same effect. We may be seeing this already, where the national courts of certain States are now careful to avoid using public policy too openly even as a pretext so as to pre-empt criticism from abroad. In these countries, it is said that judges are covertly instructed to use in their public judgments, if possible, a pretext other than public policy under the New York Convention to refuse enforcement of foreign awards. As with the Ten Commandments, it would therefore serve no purpose to re-draft the public policy exception in the New York Convention.

Fourthly, the human race is not stupid. Most, if not all, of the apparent difficulties regarding both the Ten Commandments and the New York Convention can be and are resolved by intelligent and reasonable interpretation made in good faith by members of the human race, including judges. 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 New York Convention. 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, the IAI, 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.

But all this is not enough to dissuade those extreme activists who want to change the New York Convention, to add words for the sake of more words and to reform for the sake only of reform. For them, the only answer is to show them how the UNCITRAL Working Group actually works in practice. In saying this, I make no criticism of the UNCITRAL Secretariat or the presidents of the Working Group. Despite their best efforts, for many years, the UNCITRAL Working Group on Arbitration is now the classic example of an institution where the inmates have taken over the lunatic asylum. If it can do something in a day today, it will be done tomorrow in two and then, like Sisyphus or Groundhog Day, again and again. If UNCITRAL had been in charge of building Rome, it would be still be, after three thousand years, a small rustic village.

It is equally possible to imagine what would happen if the Ten Commandments were subject to reform and amendment by the assembled churchmen and women of the world. They cannot agree on transubstantiation, married priests, women priests and bishops and many, many other matters, including God. No-one has, in fact, dared to propose such an assembly of believers, where the Pope and his cardinals would sit with the Chief Rabbis, the Religious Right with the Russian Orthodox, the Scottish Wee Frees with the Uniates, and the Maronites with the Copts. I have not even mentioned Dr Paisley of Northern Ireland, 50% of whose vocabulary has traditionally been “no.” The mind boggles at the idea of such a convocation to re-draft the Ten Commandments. It could never lead to anything good or useful or, indeed, anything.

The fate of the New York Convention would be no different at UNCITRAL. All other work on arbitration would stop. The UNCITRAL meetings would, however, never cease. The new draft would jump from 16 to an infinite number of articles, with the mantra that ‘more words are best and reform is good for the sake only of reform.’ But there would be much worse: certain

well-known States and every insane NGO, often a pleonasm at UNCITRAL, would add its own mad ideas. And the end-product, if there were ever to be an end-product, could only lead to a two-tiered New York Convention, dividing the world's States into sheep and goats; and a great treaty, which had worked so well for so many decades, would have been smashed beyond repair.

There is a final and more local reason against reforming the New York Convention. Article VII(1) of the New York Convention permits a State court to recognise and enforce an arbitration award under the higher standards of its own laws. It is this provision which has allowed French jurists, both judges and scholars, to advance many of the important legal innovations which underpin the modern system of international arbitration and which have been adopted, in whole or in part, over the last thirty years in other State courts, national laws and arbitral institutions.

I do not have time to mention these achievements; but they are well known to us all; and they must be allowed to continue and develop further. It is, in particular, scholars from Dijon which have led these intellectual achievements; and I mention here only those from the past: René David, Berthold Goldman, Henri Motulsky and the much missed Philippe Fouchard. Without Article VII(1), their ideas would have been much more difficult to assimilate, even in France. We should not therefore take Article VII for granted; and yet, above all other articles in the New York Convention, it now faces the threat of reform amounting to extinction.

With the recent Heidelberg Report on reforms to the EU's Brussels Regulation (and implicitly the Lugano Convention) and with the exclusive competence of the European Union intended under the Lisbon Treaty to negotiate and sign any "New" New York Convention for the European Union's Member States, we can be fairly certain that this part of Article VII(1) would disappear

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from any revised New York Convention. And with it the great French contribution to international arbitration would be reduced to the lowest common denominator in the European Union. That would be more than a catastrophe. It would be, I suggest, a mistake.

In conclusion, even if the New York Convention were broke, which it isn't, the likely "cure" would be far worse than any imagined malady. It would turn a healthy workhorse into a lame old nag, if not actual cat-food. So thank-you, Dr van den Berg - but no thank-you and please now return to your writing-desk ...