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A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards

H.E. Judge Howard M. Holtzmann

“To dream the impossible dream...”

These are the words sung by Don Quixote in *The Man From La Mancha*. Perhaps they apply equally as I set out to tilt at the windmills of national sovereignty by suggesting that a valuable task for the 21st century would be to create a new international court that would take the place of municipal courts in resolving disputes concerning the enforceability of international commercial arbitration awards. Before we dismiss this embryonic thought as an “impossible dream”, let us pause for moment to consider whether many of the developments in international arbitration that seem ordinary today would have been thought to be impossible dreams 100 years ago when the predecessor of the London Court of International Arbitration first opened its doors to serve the business community. If, for example, someone had predicted in 1898 at a celebration of the inauguration of the London Chamber of Arbitration that within the coming century 90 nations would enter into a multilateral treaty binding themselves to procedures requiring the recognition and enforcement of foreign arbitral awards such as appear in the New York Convention,¹ would that not have been viewed as an

impossible dream? Yet, today, we recognise that the New York Convention is an indispensable element in the structure of international commercial arbitration.

The system of international commercial arbitration works best within a framework that has five intertwined, yet separate, elements. These are:

(a) effective arbitration clauses,
(b) efficient procedural rules,
(c) experienced arbitral institutions,
(d) national laws that facilitate arbitration, and
(e) international treaties that assure the recognition of agreements to arbitrate and the enforcement of foreign arbitral awards.

As we approach the 21st century, the situation with respect to the first four elements is already highly developed. Although we can expect that the state of the art as to arbitration clauses, procedural rules and institutional practice will continue to be refined, fundamental innovations do not appear to be needed. Similarly, one can be reasonably confident that the movement to modernise national laws will become even more widespread, with the UNCITRAL Model Arbitration Law providing valuable guidance for States that choose to enact it, and serving as a yardstick by which to measure the desirability of laws in States that decide to depart from the UNCITRAL pattern. In contrast, the situation with respect to the fifth vital element, international treaties, challenges the arbitration community to search for additional solutions that will internationalise the process still further and thus achieve a truly universal system of international commercial justice.

International treaties are a vital element in the framework of international commercial arbitration because they are the best means of ensuring that courts in one State will respect agreements to arbitrate in another State and will enforce awards made abroad. The most widespread and effective treaty for the recognition and enforcement of foreign arbitral awards is the New York Convention. That Convention is already widely accepted in all geographical regions, in both developed and developing countries, and in nations with different economic, legal and social systems. The number of adherents to the Convention continues to grow steadily.

Notwithstanding its widespread acceptance, the New York Convention falls short of achieving complete internationalisation of the system of commercial arbitration. That is because, while the Convention specifies properly limited grounds for refusing
recognition and enforcement of awards, it leaves the function of determining whether those grounds exist to the municipal courts of the State where recognition and enforcement is sought.\(^2\) Moreover, enforcement may be refused if the municipal court in the country where enforcement is sought finds either that “(a) the subject matter of the dispute is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country”.\(^3\) Thus, under the Convention, the role of municipal courts can be pervasive and decisive in determining the enforceability of international arbitration awards.

This involvement of municipal courts in the enforcement of foreign arbitration awards has a practical effect on the free flow of international commerce. For, as I have noted elsewhere, “when business people enter into foreign trade and investment transactions they hope that there will be no future disagreements, but they fear disputes may arise. The possibility of future disputes is seen as one of the risks of the transaction”.\(^4\) Wise business people recognize that this risk may be exacerbated by the fact that in most cases in which a losing party refuses to honor an award it will be necessary for the winning party to seek enforcement by a municipal court in the country where the loser makes its home and has its assets. In such circumstances, businesses often perceive that there is a risk that a municipal court might favour a national of its own country. And even when there is confidence that favouritism will not affect the decision, there is the patent risk that the party against whom enforcement is sought will have a home field advantage in litigation in its own municipal court where it will be familiar with the legal system and where proceedings will be conducted in its own language. These risks are seen as even greater when the losing party is a State entity or where the national economic interest of the loser’s country might be affected by the outcome.

It is an economic truism that when risk is increased because of fear concerning the ability to enforce arbitral awards in potential future disputes “businesses react in one of two ways: either they refuse to enter into the transaction because the risk is too great, or they raise the price to compensate for the additional hazard”.\(^5\)

\(^2\) Art. V, para. 1.
\(^3\) Art. V, para. 2.
Alternatively, businesses may seek to devise mechanisms for letters of credit, performance bonds or other forms of contractual guarantees, all of which add to the cost and complexity of the transaction. On the other hand, to the extent that the risks relating to enforcement of arbitral awards are lessened, the conduct of international trade and investment is facilitated.

The new international court for resolving disputes on the enforceability of arbitral awards that I propose, is designed to remove the risks inherent in the present regime of the New York Convention which, as noted, requires recourse to municipal courts—most often in the loser’s country. The new court would have exclusive jurisdiction over questions of whether recognition and enforcement of an international arbitration award may be refused for any of the reasons set forth in Article V of the New York Convention. Each State that adheres to the new Convention would thereby undertake an international treaty obligation to execute judgments of the new international court with respect to persons and property within its territory. The new court should have the power to impose damages on States that do not fulfill that obligation.

The new international court would not only take over the functions now performed by municipal courts under the New York Convention, but would also be substituted for municipal courts at the place of arbitration with respect to applications for setting aside or enforcing awards. This would be valuable because it would facilitate international contract negotiations by removing a difficulty the parties often face in reaching agreement on the choice of the place of arbitration of any future disputes. One side may propose arbitration under the rules of an arbitral institution in its home country or region, while the other side may object to the proposed place because—notwithstanding that the proposed rules, administering institution, national law and New York Convention status may be acceptable—it does not wish to submit to the municipal courts of that place any applications for setting aside or enforcing an arbitral award. This fear of particular municipal courts may, or may not, be justified, but its mere existence can seriously hamper harmonious contract negotiations. This impediment could be removed by providing in the proposed new convention that applications to set aside or enforce awards would be within the sole jurisdiction of the new international court.

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One of the most difficult challenges in drafting the new convention will be to devise a mechanism so that execution of judgments of the new international court will not be subject to interference or delay by municipal courts. I envisage that States would undertake in the new convention to have their appropriate ministerial officials promptly execute judgments, or orders, of the new international court, just as those officials now execute decisions of the State's municipal courts. The new convention might be written so that this process would become effective automatically upon a State's adherence to the new convention, or it might contemplate the possibility of implementing legislation in some States, as is the case with the New York Convention. Such a mechanism is, of course, indispensable because without it creation of the new court would merely insert an additional step in the procedure for enforcing awards, and municipal courts would continue to have a decisive function thereby defeating the purpose of the new convention.

Another problem that would need to be solved in drafting the new convention is to find a way to ensure that interim measures of relief, such as attachment of assets, would be quickly available before the new court has finally decided on the validity and enforcement of an award. Interim measures provide important safeguards, and the possibility of obtaining them quickly and effectively in appropriate circumstances should be preserved.

The new convention should modify the provision of the New York Convention that permits a court to refuse recognition and enforcement of an award if that would be contrary to the public policy of the country in which enforcement is sought. It seems more appropriate that the new international court should apply provisions of international public policy, rather than attempt to discover and effectuate the public policy of any particular State. This proposal is not a radical one, because enlightened municipal courts already follow the practice of applying international public policy in cases involving international commercial arbitration.

While I consider that the proposed new international court would be highly useful, the need for it must be kept in proper perspective. In this connection, we must recognise two facts: first, in most cases no issues arise as to enforceability of awards because parties comply with them voluntarily; and secondly, as the many cases reported in the Yearbook – Commercial Arbitration demonstrate,
municipal courts seized of cases under the New York Convention rarely refuse to recognise and enforce arbitral awards. Nevertheless, there are compelling reasons for creating a new international court for resolving disputes on the enforceability of arbitral awards. Such a court would promote uniform standards and predictability. Further, a new court would be better positioned to avoid the delays that are often experienced in crowded municipal courts where it can take years to reach a final judgment. And, most significantly, such a court would, for the reasons explained above, facilitate international trade and investment by reducing the risks and uncertainties that business people fear when they must submit their affairs to the court of a foreign country.

It would be appropriate to locate the new court in The Hague where it could benefit from the administrative and physical facilities of the Permanent Court of Arbitration and the great library resources of the Peace Palace.

Judge Stephen Schwebel, in supporting this proposal aptly suggests that the new court might be called the “International Court of Arbitral Awards”, and his paper perceptively envisages some of the key provisions of a convention establishing the new court and prescribing its structure. His review of decisions of the International Court of Justice in cases that support the arbitral process encourages us to have confidence that the new court now proposed would similarly respect and uphold the principles of international commercial arbitration.

I began this paper by referring to Don Quixote’s “impossible dream”. I hope, however, that the ideas here suggested will be seen as a natural evolution rather than an impossibility. If that is so, it may be appropriate to conclude by quoting Shakespeare’s lines from *Henry IV*:

“There is a history... The which observed, a man may prophesy, With a near aim, of the main chance of things, As yet not come to life...”

Given the history of developments already achieved in international commercial arbitration, can we not prophesy “with a near aim” that “the main chance of things” to come in the 21st century includes the creation of an international court for resolving disputes on the enforceability of arbitral awards?