

*Casablanca Arbitration Days 2018*  
*The 60<sup>th</sup> Anniversary of the New York Convention*  
*CIMAC*

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When Nation-States around the world signed the New York Convention in 1958 and Morocco in 1959; and when after 1958 it was adopted as a United Nations Convention, old States and newly formed States acceded to it but one thing that they did not do was to give up sovereignty.

Fali Nariman, former president of the International Council Commercial Arbitration, has said about sovereignty:

Sovereignty is like billiard balls: they collide often, but seldom do they go in the same direction.<sup>1</sup>

To Contracting States of the New York Convention I say this: international law perhaps has not achieved much, but it is good that it is there. The New York Convention has achieved much indeed: 159 States have acceded to the treaty. Over 2500 judgments have been reported in the Yearbook Commercial Arbitration.<sup>2</sup> The majority of awards have been enforced under the New York Convention.

Therefore, 2018 is the year that one celebrates the 60<sup>th</sup> anniversary of the New York Convention and hails its success.

Lord Mustill was right in considering this treaty to be of such singular importance:

The New York Convention perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law.<sup>3</sup>

And Koffi Annan:

This landmark instrument has many virtues. It has nourished respect for binding commitments, whether they have been entered into by private parties or governments. It has inspired confidence in the rule of law. And it has helped ensure fair treatment when disputes arise over contractual rights and

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<sup>1</sup> [https://www.arbitration-icca.org/media/2/13916005409590/nyc\\_roadshow\\_speech\\_23rd\\_nov\\_nariman.pdf](https://www.arbitration-icca.org/media/2/13916005409590/nyc_roadshow_speech_23rd_nov_nariman.pdf).

<sup>2</sup> [https://www.arbitration-icca.org/publications/yearbook\\_table\\_of\\_contents.html](https://www.arbitration-icca.org/publications/yearbook_table_of_contents.html).

<sup>3</sup> M.Paulsson, 'The 1958 New York Convention in Action', (Kluwer 2016), p. xxi.

obligations... International trade thrives on the rule of law: without it parties are often reluctant to enter into cross border commercial transactions or make international investments.<sup>4</sup>

The judicial application of the NYC has demonstrated the restraints of the NYC that is now 60 years old. It reveals a practice of judicial rewriting of the text. No more is left of its provisions than a mere framework that will be read differently by courts around the world and notably by courts in important trading nations. The NYC has become a box of chocolates.

Today we face the apocalypse now: The - what I call - Russian Doll effect:

1. Art. II: the 'in writing' requirement on which basis an arbitration agreement must be signed or concluded by an exchange. The current practice in international trade reveals that many agreements to arbitrate come about through tacit acceptance or incorporation by reference.
2. Art. III: especially in the U.S. one has adopted some of the 'worst practices' with the use of common law doctrines such as Forum Non Conveniens and Personal Jurisdiction. These doctrines have been used under Art. III - rules of procedure of the country where enforcement is sought - as a stopper to enforcement. Although the ABA has issued resolutions to condemn this and although courts in different circuits try to develop different precedents: these doctrines are still current law.
3. Art. IV: the article is in principle straightforward and simple: the successful party need only to submit the award, agreement and translation. However, the drafters also required the applicant to authenticate and certify the award which has led to - what I call - the Pandora's Box. The processes of authentication and certification has been used by consulates and embassies as a stopper to enforcement when the respondent is a State-owned entity of that country. This is sovereignty in its fullest form.
4. The Russian Doll in full force: Art. V(1)(e), the (non) enforcement of annulled awards. The losing party files for the setting aside award at the seat, can appeal and often go to the highest court while the successful party will seek the enforcement in various jurisdictions at which occasion respondent again tries to stop enforcement. There too often there is the possibility of appeal and cassation.

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<sup>4</sup> M.Paulsson, 'The 1958 New York Convention in Action', (Kluwer 2016), p. 1.

5. Art. I(2): decision rendered by permanent arbitral bodies. The idea that decisions - called 'awards' - rendered by a 'permanent court' - the permanent arbitration court proposed by the EU - could be enforced under the NYC: this is false.

There is not enough time this morning to unravel the truth about Art. V(1)(e). Let me just say that if one is to respect the text of the NYC and its drafting history - the travaux préparatoires, PEMEX as rendered in New York by Judge Hellerstein and confirmed by the Second Circuit has risked opening the floodgates to not a discretionary use, but an arbitrary use of the NYC.

With the use of the elements of the NYC engrained in localities such as rules of procedure and the use of public policy-glossing, the billiard balls of sovereignty are flying around through geopolitical and nationalist waves.

### *Solutions*

Many scholars and judges have developed theories or doctrines if one wishes that assist in the interpretation of the text of the NYC. For Article V(1)(e) the following theories have been developed:

- the theory of Local Standard Annulments v. International Standard Annulments
- *Ex Nihilo Nil Fit*
- Art. IX of the 1961 European Convention
- Art. VII of the NYC as used by the French to opt out of the NYC and apply French law.
- The use of the word 'may' to enforce annulled awards because there is a broad discretion for judges.
- The public policy gloss developed by U.S. courts.

The above theories mean that the parties can no longer predict what happens once an award is annulled. Furthermore, we cannot expect judges to be versed in these various theories and understand when to apply which. In sum, it does not contribute to a harmonized application of the NYC.

With that, other solutions have been proposed. On one extreme end of the spectrum, Albert Jan van den Berg has proposed the replacement of the NYC altogether. Ten years ago he wrote the Miami Draft.

On the other side of the spectrum, members of the community have hailed the NYC to the point where they proposed a Nobel Prize was in order: to be awarded to the founding father of the NYC: Pieter Sanders. And if that was not possible: his organization, the International Council for Commercial Arbitration. I believe we are applauding ourselves too much.

A moderate approach is UNCITRAL suggesting to simply monitor the outcome of the NYC. With that, I would say we have gotten to comfortable.

Therefore, I propose to do what Pieter Sanders did in 1958: valse hésitation, two steps forward, one step back. In 1953, it was the ICC representative Haight, who proposed the replacement of the 1923 and 1927 Geneva Conventions with a draft that embraced the idea of a-national awards completely detached from their country of origin: two steps forward. The ECOSOC did not want to go that far and simply wanted to do away with the double exequatur. Then Piet Sanders -being a skilled diplomat more than anything else - took one step back and created the structure of Artt. IV and V: which is the core reason for the NYC's success.

So having learned from that, I would say that the Miami Draft - the replacement of the NYC - is one of two steps forward which enables us to reflect on the future of the NYC. One then takes a step back by focusing on the *power of soft law*. Soft law can be relied upon as a source under the Vienna Convention on the Law of Treaties. The type of Soft Law that I propose is a Global Restatement for Judges: a set of reading glasses for the judiciary if one wishes that facilitates a harmonized judicial application around the world.

Why a Global Restatement and not a replacement of a treaty? Even if the text of the NYC 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. Yes, Piet Sanders was there, and Holleaux and Holtzmann but otherwise the delegates were representing the sovereign interests of their countries. They were diplomats and government officials. The text was an agreement to disagree. A treaty is built on the idea of sovereignty. Today, with 159 Contracting States and the current geopolitical landscape, one cannot predict what this agreement to disagree would look like.

Finally, after this week's fruitful meetings with the ministry and the judiciary, I would like to conclude with recommendations/resolutions for Morocco and CIMAC:

Resolutions for the flourishing of international arbitration and application of the NYC in Morocco

1. Dialogue and roadshows with the judiciary and policy makers;
2. Applying the NYC in accordance with its purpose and spirit;
3. Proper implementation of guidelines on the applications of rules of interpretation for both statutory and treaty interpretation;
4. Updating a catalogue or database of enforcement decisions - domestic and international - under the NYC and Moroccan law.
5. Aligning procedural frameworks with the NYC and avoiding excessive formalism;
6. Aiming for specialization among judges, specialized subsections and continued exchanges;
7. Enforcing agreements consistent with international trade; relaxing the 'in writing' requirement;
8. Applying a good faith interpretation of the NYC;
9. Using public policy with constraint and caution;
10. Education of lawyers, arbitrators and arbitral secretaries.

Finally, it is always important to change if need be the culture and mindset of all - judges and arbitrators are part of the same team: to promote international trade.

We do well to remember that in 1958, the NYC was created after the aftermath of World War II. Then and now:

*If the international community sees profit in peaceful commerce, it is less likely to disrupt it by fighting wars.*

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