

REPORT AND THE INDIA RESOLUTIONS FOR THE 1958 CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN AWARDS

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On the 23rd of November 2013, the Judicial Dialogue on the 1958 New York Convention in New Delhi was inaugurated by the Honorable Mr. Justice P. Sathasivam, Chief Justice of India, in the presence of India's Supreme Court of India Justices, judges of High Courts (including the High Court of Delhi), practicing lawyers (by invitation), and young judicial officers receiving training in the Delhi Judicial Academy. The purpose of the Dialogue was to consider how progress might be made towards a more effective application of the New York Convention of 1958 in India.

The need to develop a set core of concepts to apply the Convention (and the implementing legislation) in a contemporary manner was expressed: all the more urgent now as the Convention is basically informed by little, save its 1958 Drafting History – which is almost entirely outdated. Even the Drafting History is a source of limited use ever since the Convention has entered the national space through implementing enactments. It was felt that a contemporary understanding is needed rather than harkening back to observations made 50 odd years ago.

This report introduces the **India Resolutions** on the Convention with an **Explanatory Note**, which is hoped will provide a platform for future Judicial Dialogues on the Convention. Those who are less familiar with the Convention will find an overview of the two principal judicial actions called for by the New York Convention: viz. recognition of Arbitral Agreements and Enforcement of foreign Awards.

THE INDIA RESOLUTIONS FOR THE 1958 NEW YORK CONVENTION

- 1. Not To apply Section 44 (b) of the Act in a formally restrictive manner.*
- 2. To apply the 1958 Convention (and implementing legislation) in accordance with the purposes of the Convention.*
- 3. To balance the commercial need for solid contracts with the recognition that confidence in arbitration requires judicial control of misconduct.*
- 4. To adopt good faith as the foundation of interpretation.*
- 5. To enforce arbitration agreements (under Article II) in a manner consistent with the needs and practice of international trade.*
- 6. To establish the validity of the arbitration agreement on the basis of the parties' mutual intent.*
- 7. To avoid excessive formalism when enforcing awards (Article IV).*
- 8. To interpret "extra evidence to prove that the award is a foreign award" in the manner of a Charming-Betsy alignment (Article IV).*

9. *To eschew a review on the merits (Article V).*
10. *To adopt a narrow conception of public policy -- ‘ordre public’ -- in a manner that is consistent with a near-universal treaty expressed in five official languages (Article V (2)).*

EXPLANATORY NOTE

The Convention in the national space: is “globalization” a myth?

Codes of procedure diverge as expressions of institutions and practices in the national space. The Convention’s Drafters had no other choice but to respect sovereign legal orders. For instance, Article III defers to the “rules of procedure” of the Contracting State. Article IV does not explicitly defer to the *lex fori* for the assessment of certification and authentication of the documents to be submitted by the applicant, but the silence necessarily leads to deference to national rules.¹

Many of those who aspire to create a culture that allows for the Convention to become a true ‘global’ instrument for the enforcement of arbitral awards fail to appreciate the nature of the Convention and its dependence on local notions of procedure. Despite its transnational reach, the Convention is not ‘global’ but ‘glocal’: i.e. global in design and effect, but entirely reliant on local operational systems.

In short: the Convention operates in the national space and only through the agency of National Courts.

The role of the national courts

The Convention is designed so that its effective outcome in the national space will depend on the just application of its provisions by National Courts.

First, the Convention contains explicit references to national rules of procedure and the application thereof by national courts.

Second, not all provisions of the Convention contain a choice of law, thereby deferring to the local rules of Conflict of Laws and the application thereof by courts. Roughly, this deference can result in either the application of the *lex arbitri* or the *lex fori*.

Third, the Convention has left gaps to be filled by judicial interpretation: Article I does not define “arbitration” or “award”. Articles III and V (1) (e) do not explain the meaning of “binding”. (The gaps were deliberate - often a conscious choice of the delegates to the Convention.)

¹ The law of the forum where enforcement is sought, is usually referred to as the *lex fori*. The law applicable to the arbitration and chosen by the parties, is usually referred to as the *lex arbitri*. As the two terms are commonly used in international arbitration, the two terms are also used in this Report and Resolutions.

Yet, the Convention was not intended to become a field-day for lawyers and a nightmare for the successful party to the award. What then has the Convention become for judges?

It is suggested that Judges must interpret the Convention in the national space and thus balance authoritative decisions reached in international business transactions -- international arbitration awards -- with national rules and notions of public policy. This balance must be based on good faith and fairness, bearing in mind that the Indian Enactment,² implementing the Convention, found its origin in the international community. It is this community which this very important multilateral treaty is an expression of and of which India is an important member.

Sovereignty

The Drafters in 1958 created an effective instrument of international law, but accommodated agreements to disagree. Agreements amongst States presume that States are willing to sacrifice some part of their sovereignty. This presumption is the prerequisite that makes international law effective. Yet, that same notion of sovereignty retains restrictions that limit the international order. It is notably expressed in the Convention by the public policy exception contained in Article V (2). In 1958, the Secretary-General of ECOSOC, after identifying the objection to Article V (2) by some governments on the grounds that that provision would create 'an existing convenience of the system of *double exequatur*',³ proposed:

[W]ould the Contracting States have been prepared, on a worldwide basis, to accept as conclusive and final the decisions made by authorities of another country on the questions of the competence of arbitrators and the correctness of the arbitration procedure and whether all Contracting Parties would be willing to undertake to enforce foreign arbitral awards without retaining the right to examine themselves these aspects of the regularity of the award?⁴

The treaty was not expected to impinge on national judicial authority, but instead was to ensure that mandatory limitations were respected -- such limitations not being static -- which is precisely why they were not 'frozen' as of the year 1958.

The Convention in India

India ratified the Convention on July 13, 1960. It came into effect in India on October 11, 1960. It has currently been enacted by India's Parliament in the Arbitration and Conciliation Act of 1996 in Part II, Chapter I, sections 44-52.

In his inaugural address at the *Indian Dialogue*, the Honorable Mr. Justice P. Sathasivam, Chief Justice of India, described the launch of a healthy judicial discussion as

²The Foreign Awards (Recognition and Enforcement) Act, 1961 has been repealed and replaced by similar provisions in the Arbitration and Conciliation Act, 1996 (the latest law on the subject).

³In particular, the 1927 Convention -- Article 1(d) of the 1927 Convention -- provided that an award could be enforced only if it had become final in the country in which it had been made. This need to prove finality in the country of its origin as a prelude to an award's enforcement elsewhere came to be known as the "double exequatur requirement", and was a great obstacle to the trans border reliability of awards -- contrary to the very purpose of the treaty.

⁴Drafting History of the Convention, UN DOC/E Conf.26/2, p. 10 in a Note by the Secretary-General.

a “laudable effort,” as in spirit, the Convention almost entirely depends on the approach adopted by the national courts in the States where it applies:

India, as a Nation, has always favored arbitration both at domestic as well as at international levels as an established method of resolving commercial disputes. The significance of arbitration has enhanced more along with the growth of international trade and commerce and the conflicts springing from these pursuits. (...) In short, this essentially private process has a public effect, implemented with the support of the public authorities of the State and expressed through the State’s national law. This interrelationship between national law and international treaties and conventions is of vital importance to the effective operation of international arbitration. (...) The [Convention] has been a multilateral instrument, possibly the most successful ever in the field of international law. While it is believed that the majority of arbitral awards are satisfied through the voluntary compliance of the parties involved and for the few which are not, the Convention provides the mechanism to do so. (...) So long as the concept of state sovereignty is paramount, decisions in respect of any transnational dispute can only be enforced through sovereign national courts: a fact clearly stressed in the provisions of the Convention. This is so because even a unanimous decision of an international forum has no greater force than an evocative appeal, sovereign nations still being really sovereign.

Thus it will not be an exaggeration to say that the effective existence of international commercial arbitration is entirely dependent on the tolerance of obligations by member states of the Convention.

And so, the Chief Justice (in his address) embraced the United Nation’s aim of enabling international arbitration as a means of dispute resolution.

Likewise, the former Secretary-General of the United Nations, Kofi Annan, commemorated the success of the Convention at the 40th anniversary of the Convention on June 10, 1998:

This landmark instrument has many virtues. It 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 obligations. As you know, 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.

The 149 Contracting States cannot make progress towards the rule of law or realize the effective outcome of the Convention -- an international instrument -- without judicial insight and guidance.

The ICCA Guide to the Convention was prepared *for judges*. The India Resolutions are a result of discussions with Judges at the Dialogue and have been discussed with judges. And it ought to be so.

Making international law work in the national space is almost exclusively the function of the judiciary: this was recognized in 1804 by Chief Justice Marshall of the Supreme Court of the United States in the case of *Murray v. Schooner Charming Betsy* (6, 2 Cranch, 64, 118) in which he held that “an Act of Congress ought never be construed to

violate the law of nations if any other possible construction remains.” This is what has come to be known as ‘the *Charming Betsy* alignment’-- prompting courts to interpret a national enactment of a text that found its origin in the international space in such a manner as to respect the latter. The idea of Chief Justice Marshall and the presumption he created to construe national acts so as to ensure compliance with international law is admirable, exemplary, and exceptionally well suited to the 1958 Convention. It is also in accordance with the obligations set forth in Article 51 of India’s Constitution - “*The State shall endeavour to (a) promote international peace and security; (b) maintain just and honourable relations between nations; (c) foster respect for international law and treaty obligations in the dealings of organised people with one another; and (d) encourage settlement of international disputes by arbitration.*”

The background of the India Resolutions

Guided and enlightened by the members of the Indian judiciary, it seems possible to evolve a set of resolutions by, and for, an optimally effective implementation of the 1958 Convention in India -- and thus to provide inspiration elsewhere (since some examples of judicial solutions by India’s Judges may commend themselves outside India as well). Indian courts have found a seemingly simple, but effective, solution to a part of the Convention where ‘the shoe pinches’: viz. the definition of “*in writing*” in Article II, paragraphs 1 and 2. An agreement may be recognized under the Convention only if that agreement is in writing, which requires either the signature of both (or more) parties of the arbitration clause or agreement, or an “exchange by telegrams.” The solution lies in the word “include” in Article II (2) of the Convention. Although many other courts have replaced the stringent requirement of “in writing” with ‘conduct,’ they have not been able to justify such interpretation under the Convention. UNCITRAL recommends courts to rely on Article VII (1) and opt for more favorable laws based on the UNCITRAL Model Law or to approach Article II (2) as ‘non-exhaustive.’ The latter recommendations seem to be deemed relevant in view of modern means of communication. Yet, whilst UNCITRAL has not legitimized that interpretation, Courts in India have: by a simple expedient: viz. by relying on the expansive word, non-exhaustive word “include” in the English text (in Article II (2) of the Convention).

Further, courts in many places have struggled to understand and establish parties’ intent to “undertake to submit to arbitration any differences between them” and thus validate the arbitration agreement on the basis of Article II (1), a *conditio sine qua non* for the recognition of the arbitration agreement under the Convention.

Courts have attempted to cure pathological clauses in all sorts of ways in order to abide by the Convention and act on the basis of a pro-enforcement attitude. However, to effect the purpose of the Convention -- contributing to the effectiveness of international arbitration -- courts also have the duty to deny the effect of an alleged arbitration agreement if there is no clear mutual intent. That rejection, when justified, will *increase* trust in arbitration. And so, it is noted that Indian courts adopt a strict attitude: *parties must say what they mean and mean what they say!*

Finally, Indian courts have adopted a notion of *public policy* that departs from the distinction made internationally between international and national standards of public

policy, the former being narrower than the latter.⁵ This distinction sounds apt in the ears of theorists, international practitioners, and courts that are pro-enforcement ‘biased,’ but is not readily applied by most courts as their laws do not know such distinction. There is only one public policy; however, there are various interpretations of it. The Indian courts now understand public policy to be essentially “fundamental notions of morality and justice.”

⁵ See the recent decision of a Bench of three Judges of the Supreme Court (3rd July 2013) in *Shri Lal Mahal Ltd., vs. Progetto Group SPA* reported (at the moment) only in 2013 (3) Arb. L. R. page 1 (SC): Justice R. M. Lodha speaking for the Court has held that the application of the ‘Public Policy of India’ doctrine for purposes of Section 48(2)(b) of the 1996 Act, is more limited than the application of the same expression in respect of domestic arbitral awards. Enforcement of a *foreign* award can be refused in India only if such enforcement is found to be contrary to: (1) fundamental policy of Indian law; or (2) the interest of India; or (3) justice or morality.

HOW TO APPLY THE INDIA RESOLUTIONS

1. *Not To apply Section 44 (b) of the Act in a formally restrictive manner.*

The Indian Arbitration and Conciliation Act of 1996 has enacted the 1958 Convention in its part II, Chapter I, sections 44-52. Section 44 (b) provides:

[I]n one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

Section 44 (b) is merely a furtherance of Article I (3) of the Convention -- pertaining to the reciprocity reservation -- and creates a rule of evidence as to how to identify a State as a Contracting State. It gives effect to the reciprocity reservation that India has adopted. Courts ought to apply it in that fashion and not as a deliberate impediment to enforcement. Thus, Section 44 (b) ought to be interpreted on the basis of good faith. For instance if the government has not yet been able to issue an official notification only by reason of an administrative lapse and where the State of the rendition of the award is a Contracting State, it is suggested that judges may look to the official listing of current Contracting States by UNCITRAL at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html in order to ensure the fulfillment of the reciprocity reservation and then *judicially* recommend/direct to Government to consider issuing a notification in a given case.⁶

2. *To apply the 1958 Convention (and implementing legislation) in accordance with the purposes of the Convention.*

Kofi Annan, at the Convention's 40th birthday occasion, commemorated the success of the Convention. The former Secretary-General of the United Nations expressed his hope and wish that the Convention would enhance the rule of law; international arbitration was to be the most appropriate means of dispute resolution for international trade. The effectiveness of international arbitration requires that awards transcend borders and are accepted by all courts and nations. It is thus that the Convention might be a singularly important treaty for international trade.

⁶ In *V/O Tractoroexport, Moscow vs. Tarapore & Co.*, (AIR 1971 SC 1 at page 8 para 17 – decision attached) the majority in a Bench of three Judges had explained:

"Once, the Parliament has legislated, the Court must first look at the legislation and construe the language employed in it. If the terms of the legislative enactment do not suffer from any ambiguity or lack of clarity they must be given effect to *even if they do not carry out the treaty obligations*. But the Treaty or the Protocol or the Convention becomes important if the meaning of the expressions used by the Parliament is not clear and can be construed in more than one way. The reason is that if one of the meanings which can be properly ascribed is in consonance with the Treaty obligations and the other meaning is not so consonant, the meaning which is consonant is to be preferred...."

The dissenting Judge (in his minority opinion) - expressed what is now the more accurate view viz. that the section of the implementing Act "must be read in consonance with the State's international obligation and any interpretation which would restrict the obligation or impose a refinement not warranted by the Convention itself will not be justified". (para-42)

In the year 2014, one must confront the reality of that wish: the success of the Convention depends on the attitude towards it by courts, and this cannot be taken for granted.

That attitude ought not be spoken of as one of a pro-enforcement ‘bias’ -- to use the expression coined by the US courts -- since that word could mean a *systematic error*; courts are entitled to confront international arbitration, viewing it for what it really is.

Courts are a safety net and perform a vital function of checks and balances and can prevent a ‘denial of justice in international arbitration.’ If parties do not agree to arbitration yet are forced to arbitrate, a denial of access to courts, a fundamental right, is implied.⁷ Courts will reinforce and preserve trust in arbitration by all disputants, private or public, by ensuring that international arbitration is a fair means of dispute resolution.

3. *To balance the commercial need for solid contracts with the recognition that confidence in arbitration requires judicial control of misconduct.*

Over the years, American and English courts have registered a shift in attitudes – moving from hostility to a friendly attitude towards arbitration. Courts have acknowledged the value of international arbitration. These courts have been willing to step aside and let arbitrators adjudicate the dispute. Such a judicial attitude preserves arbitration and projects that arbitration is not anti-theatrical in any way to a Court resolution of the dispute. But courts must be wary of the Achilles’ heel of arbitration: its relative lack of transparency and regulation. Courts must hold a mirror in front of arbitration and recognize its flaws and potential wrinkles. For instance: the tendency towards Americanization of the arbitral process resulting in high costs and drawn-out proceedings and excessive variability in the qualifications of arbitrators. But must the court always be arbitration-friendly? Here is where the drafters of the Convention -- and its ‘Father’, Professor Pieter Sanders -- attributed a vital role to the courts: being a safety net and performing the function of checks-and-balances. It was the US delegate to the Convention who emphasized the “utmost importance of judicial supervision, for it alone could ensure that justice was done.”⁸

It is the task of the courts to hold international arbitration to its original idea, and the attractiveness that it created for the business audience: a cost effective procedure and leaving it to arbitrators who have been appointed by the parties for the particular dispute.

4. *To adopt good faith as the foundation of interpretation*

For both international norms of treaty interpretation and national rules of interpretation, the foundation is good faith. The Vienna Convention on the Law of Treaties, to which India is a party, provides in its general Article 26 and its provisions on treaty interpretation -- Article 31 (1) -- that one must comply with international law and interpret treaty provisions *on the basis of good faith*. This foundation is equally fundamental in the national space.

⁷ In India the right to file a suit is assured in Section 9 of the Code of Civil Procedure 1908 although it is not a fundamental right in the constitutional sense.

⁸ Drafting History of the Convention, UN DOC/E Conf.26/SR.14, p.6, a comment by Mr. Becker.

In India, the Convention -- as reflected in the 1996 Act -- is applied as a matter of national law. The Indian courts apply national instruments of interpretation. The question then becomes a general one: how do judges interpret the Convention after it has been implemented? On the basis of the Vienna Convention on the Law of Treaties -- and the underlying notion of good faith -- or on the basis of Indian statutory rules? If the latter is the case, do judges apply the notion of good faith?

5. *To enforce arbitration agreements (under Article II) in a manner consistent with the needs and practices of international trade.*

Article II poses many problems. One of them is the impossibility of aligning the “in writing” requirement with current practice in international trade: parties often do not conclude an agreement before performance, and an exchange -- in the sense of offer and acceptance -- is often expressed through conduct, a common practice in some trades which fits the current pace of international business transactions. Merchants are not as concerned with formalities as lawyers are: they are focused on the efficacy of their dealings with each other.

As mentioned above, UNCITRAL issued recommendations relating to Article II (2) of the Convention and recommended that the provision be applied ‘recognizing that the circumstances therein are not exhaustive.’⁹ Under the Vienna Convention, the status of those recommendations would be of ‘soft law’ only.

Again, Indian courts take a clear and simplistic stance: a simple textual interpretation of Article II and its enactment enables a court to rely on the use of the word “include” in Article II (2), which implies a lack of exhaustive listing. The “in writing” requirement of Article II (1) “includes” either “an arbitration clause or arbitration agreement signed by the parties” or an “exchange of telegrams” as stated in Article II (2). The drafters did not exhaustively list the types of agreements that would meet the “in writing” requirement by adding the word “only” as they did in the opening of Article V (1) where the enforcement of the award can “only” be refused on the basis of the grounds set forth in that Article.

6. *To establish the validity of the arbitration agreement on the basis of the parties’ mutual intent.*

The pace of international trade has caused the birth of what lawyers call ‘pathological clauses.’ These are ambiguously drafted clauses making it difficult for courts to establish the presence of a will to arbitrate. Various courts around the world have attempted to cure these pathological clauses. The developed doctrine is two-fold: first, the court establishes whether there is a mutual intent to arbitrate; and second, if that is the case, further ambiguities or gaps in the arbitration agreement are supplemented by the court itself.

Again, the Indian approach is simple: *parties must say what they mean and mean what they say.*

Why is this so important? There is a need to set limits to the referring of parties to arbitration. Because referral results in the removal of a dispute from the courts, the will of

⁹ UNCITRAL Recommendations 2006/A/6/17 adopted on 7 July 2006 at its thirty-ninth session.

both parties to arbitrate must be clear; this should not be performed lightly. This stance promotes arbitration because party autonomy is actually acknowledged as a pillar of arbitration.

The intent to arbitrate must be evident; without intent, parties would be led into a forced arbitration and result in a denial of their fundamental right to access courts.¹⁰

7. *To avoid excessive formalism when enforcing awards (Article IV).*

Article IV sounds simple and perhaps in theory it was. Yet, in reality it has become something of a Pandora's box: which law ought to be applied? Authentication and certification: what, whom, where, and when? Should the entire award and the entire agreement be certified as to be a genuine copy of the original? Who should certify and where should that certification take place? In the country where the award was rendered or the country where the award is to be enforced? Should the award and agreement -- authenticated or certified -- be submitted at the time of application or can enforcement courts allow the party requesting the enforcement to cure any defects during the proceedings? The Swiss courts have adopted an attitude of rejection of "excessive formalism" especially when the authentication is not disputed.¹¹ Indian Courts too have not been formalistic on this score. If a court has sufficient documentary evidence to establish *prima facie* the existence of an enforceable award, there is no reason for excessive formalism.

8. *To interpret "extra evidence to prove that the award is a foreign award" in the manner of a Charming Betsy alignment (Article IV).*

Section 47 (c) provides that the courts may require -- other than the documents required under Article IV -- "such further evidence as may be necessary to prove that the award is a foreign award."

This extra element is derived from Article I (1), which sets out the scope of the Convention. The first type of award that can be enforced under the Convention is the foreign award. Section 47 (c) enables an Indian court to require further evidence to ensure that the award falls under the scope as per Article I (1) of the Convention -- on a case to case basis.¹² Thus, it is a mere matter of evidence pertaining to the scope.

10 In *Gangabhai vs. Vijay Kumar*: AIR 1974 SC 1126 Chief Justice Y. V. Chandrachud, speaking for the Court said: "There is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute, one may at one's peril, bring a suit of one's choice. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit": this as far as Indian Courts have gone to express "the fundamental right to access to Courts".

11 See for instance Switzerland, Federal Supreme Court, 8 December 2003 (*ASA v. B. Co Ltd and C SA*) Yearbook Commercial Arbitration XXIX (2004), pp. 834-842 (Switzerland no 38) in which the Court considered the *lex fori* -- which prohibits the submission of new documents in appellate proceedings -- but took into account the fact that the authenticity of the arbitral clause was undisputed and the court of first instance "had a copy of the clause in its file when it reached its decision to enforce the award":

[R]efusing the submission of the arbitral clause in the appellate proceedings would have been an act of excessive formalism.

12 The only reported case on the point is a decision of the Delhi High Court -- 2005 (2) Arb. Law Reporter page 6 (Delhi) *Austbulk Shipping SDN BHD vs. P.E.C. Ltd.* -- "Execution of foreign award" -- Party seeking to enforce award has to make application under Section 47 enclosing therewith evidence as mentioned therein -- Duly authenticated copy of original award placed on record -- Original arbitration agreement or duly certified copy of arbitration not produced by petitioner along with petition for enforcement -- During pendency of petition duly certified copy of arbitration agreement placed on record -- Substantial compliance of provisions of Act. Indian courts do not require

9. *To eschew a review on the merits (Article IV).*

Article V protects defendants' rights and State sovereignty. The courts may -- in order to protect those rights -- refuse the enforcement of awards. Caution is necessary. The losing party often argues that its "rights" are violated. To this day, some judges and public officials around the world retain a certain distrust of arbitration, unenthusiastic about the 1958 Convention, and may be tempted to avoid enforcement by improperly invoking Article V (2).

This is why canons are designed for the interpretation of Article V, and why Article V may never function (should never function) as a *de facto* appeal.

10. *To adopt a narrow conception of public policy -- 'ordre public'-- in a manner that is consistent with a near-universal treaty expressed in five official languages (Article V (2))*

Internationally, courts have embraced the so-called narrow or international notion of public policy. The leading case is well known: the *Parsons & Whittemore* decision rendered by the US Court of Appeals for the Second Circuit defining public policy under the Convention as "the forum state's most basic notions of morality and justice" and refusing to equate public policy with national policy. It is in conformity with the intent of the delegates in New York in 1958: the terms used at the time were "ordre public," "manifestly," "fundamental."¹³ In reality, not all national orders make that distinction. For some, there is one notion of public policy only. Courts, in general, are recommended to accept only international standards under the Convention. The use of international standards was encouraged by one of the experts in international arbitration, Robert Briner, former Chairman of the International Court of Arbitration of the International Chamber of Commerce (ICC), emphasizing that "there exists no real reason why the enforcement judge should apply other criteria than that of international public policy."¹⁴ Moreover, the International Law Association issued recommendations at the conference held in New Delhi in 2002 on international commercial arbitration, and advocated the use of narrow and international standards only.¹⁵ The ILA defined international public policy as follows:

The international public policy of any State includes: (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as "lois de police" or "public policy rules;" and (iii) the duty of the

any further evidence as long as the defendant does not contest the documents submitted under Section 47 and thus apply Section 47 in a manner that is favorable to the enforcement of awards: *Glencore Grain Rotterdam B.V. Vs. v Shivnath Rai Harnarain (India)*, High Court of Delhi, 27 November 2008, reported in 2008(4)ARBLR497 (Delhi), 155 (2008) DLT457= ILR (2008) Supp. Delhi 164.

¹³Drafting History of the Convention, UN DOC/E/AC.42/SR.7.

¹⁴Robert Briner, celebrating the 40th Anniversary of the Convention in his speech 'Philosophy and objectives of the Convention' in *Enforcing Arbitration Awards under the New York Convention. Experience and Prospects, (United Nations 1999)*.

¹⁵International Law Association, New Delhi Conference (2002), Committee on International Commercial Arbitration chaired by Professor Pierre Mayer, recommendation 1 (b): Such exceptional circumstances [to refuse recognition and enforcement of the award] may in particular be found to exist if recognition or enforcement of the international arbitral award would be against international public policy.

State to respect its obligations towards other States or international organizations.

HOW CAN COURTS APPLY THE RESOLUTIONS?

Separation of powers means that the powers of the judiciary may not tread on the legislator's territory. Once the Indian enactment of the 1958 Convention is in place, courts should apply that text: the 1996 Act, Part II. Courts will apply the Convention as a matter of national law and rely on statutory rules of interpretation.

How can courts then, for example, apply an internationally recognized narrow standard of public policy or rely on foreign judicial decisions on the Convention and recommendations for interpretation issued by international bodies such as UNCITRAL and the International Law Association? It is suggested that they can do so by treating Part II as an instrument that originates from an international convention and by interpreting that enactment on the basis of a presumption that India's Parliament passed this Act as giving effect to India's international legal obligations under the Convention: which is a directive principle of State Policy under India's Constitution (Article 51). Furthermore, the courts may rely on the following:

1. Discretion;
2. Good faith;
3. Purposive interpretation;
4. Functionalist interpretation;
5. Textual and contextual use of the Convention reproduced in Schedule I; as part of Indian law; and,
6. Interpretation on the basis of fairness to resolve blanks in the -- implemented -- Convention such as the lack of a definition of award in Article I (1).

Thus, courts can give effect to the Convention as concluded in 1958, making it work today under the 1996 Act, setting an example for their foreign counterparts and promote an idea of fairness, which is an inherent part of the rule of law.

OVERVIEW OF THE CONVENTION: ACTION I THE ARBITRATION AGREEMENT

The international source -- Article II of the Convention -- is applied by courts on the basis of the national Indian Act. The recognition of the arbitration agreement forms the core of the Convention as its denial -- if unjust -- causes the premature death of the arbitration.

The source -- Article II: survival by court interpretation

Article II cannot function without reference to municipal norms. Indian courts will rely on national rules of statutory interpretation of the national Act and will further apply local principles of contract interpretation to establish the existence of a valid and enforceable arbitration agreement. Finally, the courts will, on the basis of the national rules on Conflict of Laws, apply a law, which could be the *lex arbitri* or the *lex fori*. Thus, it is so that the text of Article II needs judicial interpretation and molding.

Article II consists of three subsections and provides for a formal scope, a material scope and grounds to refuse. It obliges courts to recognize the arbitration agreement and to refer the parties to arbitration.

The formal scope seems very simplistic: the agreement must be in writing, which means that the arbitration clause or agreement must either be signed by both parties or concluded through an exchange of “telegrams.” Thus the requirement can be met in two ways: a signed agreement or an exchange.

The material scope requires the court’s assessment of the validity of the arbitration agreement: was there a joint intent of the parties to undertake to submit a difference between them to arbitration?

The grounds to refuse either the recognition of the arbitration agreement or the referral of the parties to arbitration are: (1) the subject matter is not arbitrable, (2) the arbitration agreement is null and void, (3) the arbitration agreement is inoperative, or (4) the arbitration agreement has become incapable of being performed.

The courts determine the validity of the arbitration agreement on the basis of national principles of contract interpretation in order to establish if there was a joint intent by the parties to submit a dispute to arbitration. On the one hand, courts ought to recognize the parties’ mutual consent to arbitrate on the basis of a good faith interpretation. On the other hand, courts must be cautious not to deny a party the fundamental right of access to courts if it has not relinquished it by agreeing to arbitration. Courts have set limits to parties’ failure to say what they mean. The Federal Supreme Court of Switzerland refused to cure a pathological clause as parties had created an agreement to arbitrate but had added the unfortunate phrasing “or any other US court”. That addition rendered the initially clear joint intent to arbitrate ambiguous.¹⁶ Thus, judicial interpretation is based on good faith and is intended to protect either: (1) the parties’ rights to arbitrate, which is based on party autonomy, a pillar of arbitration, or (2) their fundamental rights to access courts.

¹⁶The decision was issued on 25 October 2010 in the matter between *X Holding AG v. Y Investments NV*, reported in the ICCA Yearbook of Commercial Arbitration XXXVI (2011) and referred to therein as Switzerland case no. 43.

Questions and Issues raised

India's enactment refers solely to "in writing" in Section 44 (a) without enacting Article II (2) *ad verbatim* in that Section 44: the agreement must be signed or there must be an exchange. However, the same Section refers to the First Schedule, which is the Convention. Thus, the courts are bound to test the stringent "in writing" requirement created by the Drafters in 1958.

In reality, many parties intend to be bound by an agreement to arbitrate by concluding agreements, such as Bills of Lading and other agreements common in shipping, which subsequently incorporate standard conditions by reference. It is these conditions that contain the arbitration clause. Is that a valid arbitration agreement in writing under Article II?

Further, parties, even though the agreement has not been signed by both parties, can establish their intent of wanting to arbitrate by conduct. Courts have accepted this to constitute an arbitration agreement. One must still answer the question of how exactly that liberal judicial approach can be aligned with the stringent requirement under Article II.

A US Court of Appeals for the First Circuit decision is exemplary for a fair replacement of the "in writing" requirement with 'conduct.' The basis for doing so is good faith.¹⁷ The arbitration clause in the case at hand was contained in the industry guidelines. Although the receiving party, Standard Bent Glass, did not specifically acknowledge receipt of the guidelines, it did acknowledge receipt of the agreement. Even though it had not yet signed that agreement, Standard Bent Glass had commenced performance under that agreement. This conduct established a clear intent to arbitrate. It was a common deduction from the circumstances and a conclusion that was fair and based on good faith. The reason for the court to interpret Article II in such a liberal fashion was the style with which contracts in international trade are commonly concluded today. Thus the Court adapted the 1958 text of Article II with the reality of today's international trade.

Finally, what laws will courts apply to assess, for example, whether the subject matter is arbitrable? The courts must apply their rules of Conflict of Laws, which will then either result in the application of the *lex fori* or the *lex arbitri*. International case law on arbitrability of Article II shows that courts apply a narrow notion of arbitrability. That narrow use is equally applied under Article V (2) (a). For example, under the Convention antitrust claims have been held to be arbitrable. The US District Court for the Southern District of New York held that:

[T]he Supreme Court has instructed that courts apply the statute in accordance with ordinary contract principles, with a healthy regard for the [Convention's] underlying policy, to this end resolving any doubts concerning the scope of arbitrable issues in favor of arbitration. Whether the issue at hand is a construction of the language of the agreement itself, or a defense to arbitrability. This bias in

¹⁷The case at hand is *Standard Bent Glass Corp v. Glassrobots Oy* of 20th June 2003 as reported in the ICCA Yearbook of Commercial Arbitration XXXIX (2004) and referred to as United States case no. 457.

favor of arbitration is even stronger in the context of international business transactions.¹⁸

Ideally, the Indian courts ought to apply the *lex arbitri*: as that is the law parties choose to be applicable to the dispute.

¹⁸United States, United States District Court for the Southern District of New York, 12 June 2003 (*Peter J. DaPuzzo v. Globalvest Management Company LP, Utilitivist II LLC and Utilitivist II LP*) Yearbook Commercial Arbitration XXIX (2004), pp. 900-936 (United States 453) at paragraph 2.

The Dialogue

At the outset it is to be noted that, even if courts may interpret the Convention's instructions very liberally, the subject matter must be commercial when the signatory State, like India, has reserved its application to commercial matters.

May courts rely on Section 7 as an interpretative tool for Article II (2)?

Furthermore, an interesting element of the Indian act is section 7 (4), which provides:

An arbitration agreement is in writing if it is contained in (...) a document signed by the parties; an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

Section 7 (5) further provides:

The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

India, as have many other States, has brought its national laws in line with contemporary usages in international trade; such as, the incorporation of an arbitration agreement by reference. That less stringent requirement can be applied through Article VII (1) of the Convention. However, that would mean a court will no longer apply Part II but instead the national regime. Courts would thus rely on Section 7 -- the domestic regime on the recognition of the arbitration agreement -- to incorporate and accept the conduct of both parties as a substitute for a signed agreement or an exchange.

The Indian courts seem to be divided on this point. For example, in *Shivnath v. Narain*, the court considered Section 7 -- as part of Chapter I, which regulates domestic arbitration -- and Section 44 to be distinct provisions and part of different regimes.¹⁹ The Delhi High Court in an earlier decision, however, seems to resort to the instruction under Section 7 in order to give a broad interpretation to Section 44 and to find that the requirements for the "in writing" requirement in Article II (2) of the Convention is inclusive and thus not exhaustive:

As is apparent, the term "agreement in writing" is of inclusive nature and the first and foremost condition to invoke the provisions of Sections 44 and 45 of the Act or for that purpose Section 7 is the existence of an "agreement in writing," which should be beyond the pale of dispute.²⁰

The High Court of Madras refused to make use of Section 7:

¹⁹M/s. Shivnath Rai Har Narain Vs. M/s Italgrani SPA, High Court of Delhi, 27 July 2001, 93 (2001) DLT222, 2002 (63) DRJ174.

²⁰Bharti Televentures Limited Vs. DSS Enterprises Private Limited & Others, High Court of Delhi, 14 May 2001 (unreported).

Unfortunately, the provision relating to definitions falls only under Part I. Section 2 (1) (b) defines "arbitration agreement" to mean an agreement referred to in Section 7. (...) [T]he definition of the term arbitration agreement, as found in Section 7 (1) is applicable only to Part I.²¹

At the same time, the Court created a doctrine for a possible use of Section 7 in future cases by finding that the enactment of Article II (2) is “an abridged version of Section 7.”

When a court attempts to cure a pathological clause, it must be certain of a joint intent to arbitrate as parties are contracting out of court access. The review must be a careful process. Protection of the parties by courts is vital to prevent parties from wrongly being assumed to have exited out of their fundamental right to access to courts. This error would be a denial of justice. Only when a court can establish a mutual intent shall a court refer parties to arbitration: the purpose of the Convention is not *per se* a pro-enforcement attitude but the protection or enhancement of the effectiveness of international arbitration. It is about trust. There are then two aspects to the recognition of the arbitration agreement and referral to arbitration: first, the courts will interpret the language of Article II (1) as to whether parties undertook to submit a difference to arbitration; and second, the courts will interpret the arbitration agreement itself.

²¹ Andritz Oy, rep. through Power of Attorney Agent, Mr. Siraj Ahmad Vs. Enmas Engineering Pvt. Ltd., rep. by its Director and Principal Officer and Anr., High Court of Madras, 5 June 2007, 2007 (3) ARBLR545 (Madras).

OVERVIEW OF THE CONVENTION: ACTION II THE ENFORCEMENT OF THE AWARD

Article I

Article I sets out the scope of the Convention: which award can be enforced under the Convention: (1) foreign awards, (2) those awards considered as non-domestic and the latter category may include (3) an a-national award.

Article I (3) enables Contracting States to make two reservations: the commercial reservation and the reciprocity reservation. Its counterpart is found in Section 44 of the Indian Act.

Article I has not defined the terms *arbitration* and *award*. Thus, it will be up to the Indian courts to decide whether, for instance, an *interim* award would fall under the Convention. As interim awards are regarded, the US District Court of North Carolina decided that a "termination order" was final and could be enforced under the Convention despite its title indicating the contrary.²² According to the US Court of Appeals for the Seventh Circuit, an "order", rendered in London and instructing Publicis to provide True North with tax information, was a final order because the contents of an arbitration decision, not its nomenclature, determines finality for purposes for enforcement under the Convention.²³ Finally, the Australian Supreme Court of Queensland's analysis in *Resort Condominiums International* facilitates one's understanding of "award" under the Convention.²⁴ The award at stake was an "Interim Arbitration Order and Award" rendered in the US under the rules of the American Arbitration Association and could not be enforced under the Convention.²⁵

Article III

Article III sets out the core obligation to courts: to treat the Convention award as binding and enforce it (1) in accordance with its rules of procedure and (2) the conditions set forth in the Convention. In short, these are conditions under Articles IV and V. The pitfall has come to be "rules of procedure." In some countries, like the United States, courts have relied on procedural principles, such as *forum non conveniens* or international comity,

²² United States, United States District Court, Eastern District Court, Eastern District of North Carolina, Northern Division, 21 January 2011 (Blackwater Security Consulting, LLC et al. v. Richard P. Nordan, as Ancillary Administrator for the Separate Estates of Stephen S. Helveston, Mike R. Teague, Jerko Gerald Zovko, and Wesley J.K. Batalona) Yearbook Commercial Arbitration XXXVI (2011), pp. 425-427 (United States no. 729).

²³ United States, United States Court of Appeals Seventh Circuit, 14 March 2000 (Publicis Communication v Publicis S.A., True North Communications Inc) Yearbook Commercial Arbitration XXV (2000), pp. 641-1164 (United States no. 338), at paragraph 6.

²⁴ Australia, Supreme Court of Queensland, 29 October 1993 (Resort Condominiums International Inc. v. Ray Bolwell and Resort Condominiums, Pty. Ltd.) Yearbook Commercial Arbitration XX (1995), pp. 628-650 (Australia no 11).

²⁵ Australia, Supreme Court of Queensland, 29 October 1993 (Resort Condominiums International Inc. v. Ray Bolwell and Resort Condominiums, Pty. Ltd.) Yearbook Commercial Arbitration XX (1995), pp. 628-650 (Australia no 11) at paragraph 1.:

These orders are clearly of an interlocutory and procedural nature and in no way purport to finally resolve the disputes (...) or to finally resolve the legal rights of the parties. They are provisional only and liable to be rescinded, suspended, varied or reopened by the tribunal which pronounced them.

to stop enforcement by declaring the request for enforcement inadmissible.²⁶ Section 46 of the 1996 Act enacts Article III.

Article IV

In the assessment, certification, and authentication of the documents to be submitted by the successful party (the agreement, award, and possibly a translation of the award), courts around the globe, including India, have been lenient and cautious of “excessive formalism” in dealing with the ‘Ws’ for authentication and certification: where, by whom, what, when? Where should the authentication and certification take place: in the country where the award was rendered or in the country where the enforcement is sought? Who can authenticate or certify: a public notary, or a consular agent? What should be certified: the entire award or only the essential parts and the dictum? When should the authenticated and certified documents be submitted: at the time of filing of the request for enforcement or can that be done later during the proceedings or even during the appellate proceedings?

Section 47 has enacted Article IV and provides:

- (1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court:
 - (a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;
 - (b) the original agreement for arbitration or a duly certified copy thereof; and
 - (c) such evidence as may be necessary to prove that the award is a foreign award.

Section 47 resolved many of the ambiguities found in Article IV of the Convention itself. It includes a choice of law. There is no need to certify the copy of the award. However, extra evidence may be required to prove that the award is foreign -- which is in fact a furtherance of Article I (1). India rendered a landmark decision in *GEC v. Renusagar* in which the court held that “it is necessary to bear in mind that while enforcing a foreign award one should not be extremely strict and technical as to the compliance with the requirement of Article IV (1) (a) of the Convention.”²⁷ The interpretation is one based on good faith and does not allow for the losing party in arbitration, by relying on technical deficiencies of the request for enforcement, to stop the enforcement without relying on the exhaustively listed refusal grounds of Article V. However, a minimum of evidence is

²⁶ In the US, various requirements must be met for the court to accept jurisdiction: one of the parties must be a citizen of a country other than the US; personal jurisdiction must also be established under the traditional due process minimum contact test. See the US report in the ICC Bulletin, *ICC Guide to National Procedures for Recognition and Enforcement of Awards under the New York Convention*, Volume 23, Special Supplement 2012. In *Figueiredo*, the US Court of Appeals for the Second Circuit denied the request for the enforcement of an award rendered in Peru, not because one of the refusal grounds listed under Article V warranted such refusal, but because of the U.S. applicable rules of *forum non conveniens* and international comity as applied under U.S. rules of procedure as referred to in Article III. United States, United States Court of Appeal for the Second Circuit, 14 December 2011 (*Figueiredo Ferraz Engenharia De Projecto Ltda. V. The Republic of Peru, Ministerio de Vivienda, Construccion y Saneamiento, Programa Agua Para Todos (PAPT) (successor by intergration to Programa De Apoyo A La reforma Del Sector Saneamiento (PARSSA), formerly known as Proyecto Especial Programma Nacional De Agua Potable & Alcantarillado (PRONAP))* 2011 US App. Lexis 24748).

²⁷ In *Renusagar Power Co. Ltd. vs. General Electric Co.* AIR 1985 S.C. 1156: “An application for enforcement of award accompanied by Xerox copy of original award certified to be true copy by International Chamber of Commerce was filed and subsequently before delivery of judgment the said copy was duly authenticated as required under law, it was held that it would not be said that the application was made without the original award or the copy of the award.”

required to enable a judge to make that *prima facie* assessment as to whether there is an enforceable award that was based on an arbitration agreement.

Article V

Article V enables a court to protect the rights of the party resisting enforcement and the sovereign notions of the Contracting State where the enforcement is sought. The first protection is essential to preserve arbitration as an attractive means of dispute resolution. As arbitration is not a regulated process, one does not always know one's arbitrator. Parties are not always adequately protected against an unforeseen bias or partiality. Some arbitrators have found jurisdiction where they ought not have done so. Some tribunals have rendered awards that exceeded the scope of their given mandate. It is here where the Convention regulates the system of arbitration in a manner that transcends borders and in a manner that is internationally accepted by member States of the United Nations.

The other form of protection is the respect for sovereignty and it was on that premise that States were willing to sign on to the Convention. As it was a condition to acceptance of the Convention, courts must abide by those notions of sovereignty and they are to do so on the basis of Article V (2): public policy.

The courts must be careful in the protection of those rights, though, as the main aim of the Convention was to allow for the enforcement of awards abroad. The grounds under Article V are textually problematic and require a fair amount of interpretation by courts -- potential deathtraps for applicants and a treasure trove for respondents. Thus, canons may assist courts to properly assess the warrant of refusal under Article V: exhaustiveness; serious cases only; burden is heavy; narrow construction; no review on the merits. Article V has been enacted through Section 48, (1996 Act) paragraphs (1) and (2).

Article VI

Article VI is a furtherance to the possibility to refuse the enforcement of the award if the award might be set aside in the country where it had been rendered. In some instances, a setting aside procedure is still pending before the court in the country of origin and there is a realistic chance of that court setting aside the award. Enforcing the award before the decision in the setting aside procedure has been rendered can be counterproductive as that enforcement often cannot be undone. It is then that the Indian court will have the discretion to adjourn the decision to enforce and await the outcome in the setting aside procedure. The court must make some determination as to the merit to that challenge and the court can order security to ensure the preservation of assets. The UK High Court of Justice in *Dowans* applied what is called the "sliding scale" developed in *Soleh Boneh*.²⁸

If the challenge to the validity of an award is manifestly well-founded, it would in my opinion be quite wrong to order security until that is demonstrated in a foreign court. (...) If the award is manifestly invalid, there should be an adjournment and no order for security; if it is manifestly valid, there should either be an order for

²⁸ *Soleh Boneh International Ltd v. Government of the Republic of Uganda* [1993] 2 Lloyd's Law Rep 208 CA at 212 (*Soleh Boneh*).

immediate enforcement, or else an order for substantial security. In between there will be various degree of plausibility in the argument of invalidity; and the Judge must be guided by his preliminary conclusion on the point. The second point is that the Court must consider the ease of difficulty of enforcement of the award, and whether it will be rendered more difficult, for example, by movement of assets or by improvident trading, if the enforcement is delayed. If that is likely to occur, the case for security is stronger.²⁹

The Court thus identified the following elements as important for determining (1) to adjourn and (2) to order security: for the ordering of adjournment the court will make a limited assessment only of the chances of success of the award being set aside in the country of origin deferring to the courts of origin and with respect to the ordering of security and how much, the court also considers (1) the risk of delay and (2) the risk of assets being moved. If setting aside might be successful and tip the balance on the sliding scale in favor of defendant, the court might still order security if the risk of assets being moved remains high.

Article VI can be found in Section 48, (1996 Act) paragraph (3).

Article VII

The embodiment and purpose of the Convention enacted in Section 51: enabling parties and courts to opt out of the Convention if a national law or other treaty is more favorable to the enforcement of the award. This is in furtherance of what the Convention is : (1) Recognition of Foreign Arbitral Awards, or (2) Enforcement of Foreign Arbitral Awards. The Convention is not designed or structured to provide for non-recognition of Foreign Arbitral Awards and non-enforcement of Foreign Arbitral Awards.

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²⁹ United Kingdom, High Court of Justice, Queen's Bench Division, Commercial Court, 27 July 2011 (*Dowans Holding S.A. et al v. Tanzania Electric Supply Co. Ltd*) Yearbook Commercial Arbitration XXXVI (2011), pp. 363-365 (United Kingdom no 93), at paragraph 50.