

I. A Mission for the Judiciary of Jamaica

The Honorable Mrs. Justice Zaila McCalla, O.J. Chief Justice of Jamaica - addressing the police officers club, the Kiwanis Club on June 19th, 2014 on the judiciary in Jamaica:

The quality of justice we receive as a nation is determined largely by our own actions and or inactions. We must all be willing to take responsibility for the existing state of affairs and simultaneously resolve to effect the changes necessary that must begin with a change of our attitudes. We have to assume a mindset that is directed at changing the present culture of delay. The judiciary is fully supportive of initiatives such as mediation, arbitration, restorative justice and Diversion being embarked on to improve our justice system. I welcome all these initiatives to resolve disputes and reduce the number of cases coming into the formal Justice system.²

With Jamaica adopting a new law based on the UNCITRAL Model Law and having adopted and ratified the 1958 New York Convention in 2002, with the establishment of its own arbitration center, its success of being a rising seat will depend on the role its judiciary will play and with that a change of mindset is, indeed, essential. A judiciary enforcing awards properly is secured with specialized courts and training modules. However, one is compelled to address the idea of perfection with the tempering effect of realism:

The establishment of a Judicial Education Institute is part of ongoing plans to reform the justice system. Programs will include mandatory training courses and orientation sessions for newly appointed judges. The public's confidence will inevitably be affected by its perception of the competence of judges. The relevant authorities are well aware of the need to establish a Judicial Education Institute. Jamaica is one of few countries without this facility as part of its judicial system. Of course there is the Justice Training Institute, which is an agency of the Ministry of Justice. Best Practices dictate that the Judiciary

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² <http://www.supremecourt.gov.jm/sites/default/files/pdf/CJs-Kiwanis-Speech-19.6.14.pdf>.

must be independent; hence training for judges should not be under the executive. In the meantime we have been working collaboratively with the Justice Training Institute to organize orientation sessions and training seminars in general areas, as we seek to establish a Training Institute under the Judicial branch of government.³

Similarly, in Brazil, the need for judges to be able to defer certain cases to arbitration is eminent. It enables them to address the backlog in court cases: one case tends to take on average 15 years; there is a backlog of 80 million cases. Thus, not all Contracting States to the New York Convention have the luxury of ‘Haute Execution de Sentences Arbitrales’ as do the Swiss. For some jurisdictions, deferring disputes to arbitration has become a necessity. The Swiss have a specialized court system that is exemplary for proper and harmonized application of the New York Convention. Miami has created a set of courses for judges who are part of the specialized subsection of the business court of the 11th Judicial Circuit (State Level). However, other States do not have the funds for training and specialization of judges and yet other governments do not appreciate the importance of allocating budgetary and other recourse needs for specialization and training. Yet, as Jamaica adopts the UNCITRAL Model law and as it does not have a long history of pathological application of treaties, like some other States, it starts with a blank slate, as Brazil did, and seek inspiration from successful arbitral seats. There is no need to cure any diseases. With that, it is essential to approach the role of the judiciary such that arbitration can flourish.

Ten Commandments

Courts must function as a safety net. Courts are not a *de facto* appeal to arbitration. They must:

1. Protect the sovereign’s ideas of public policy.
2. Protect respondent’s rights such as due process and the right to a tribunal that respects its mandate.
3. Protect the parties’ fundamental right to access to courts: the idea of party autonomy demands it.
4. Exercise judicial control of parties’ misconduct and be mindful of dilatory tactics.
5. Adopt a ‘hands off’ approach: judges are not there to grade papers.
6. Refrain from a review of an award on the merits.
7. Refrain from blindly adopting the “best” practices (or worst) of other jurisdictions with a longer history of enforcing awards. The New York Convention ought not to be glossed with public policy and international comity if the drafting history does not warrant it.
8. Apply the rules of procedure in a manner consistent with the New York Convention.
9. Establish a judicial culture of ‘education permanente’.
10. Embrace the New York Convention as an instrument of international law.

³ <http://www.supremecourt.gov.jm/sites/default/files/pdf/CJs-Kiwanis-Speech-19.6.14.pdf>.

Explanatory note

Jamaica, independent but part of the commonwealth Caribbean, will most likely turn towards UK decisions. Even if it would be most sensible to turn to jurisdictions based on a common law tradition, the courts of Jamaica ought to create their own doctrines under the New York Convention. They ought to look to the New York Convention as a treaty that, although operating in the national space, is dictated by the methods of treaty interpretation.

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. 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, based on party autonomy.

II. The Judicial application under the New York Convention in Jamaica

Rose Hall Resort, L.P. v The Ritz-Carlton Hotel Company of Jamaica Limited, Supreme Court of Judicature of Jamaica, 2009 HCV 05413, March 2010

The Ritz-Carlton Rose Hall Resort in Jamaica is unquestionably a good approximation of paradise. Turquoise coloured water lap around warm white sand beaches shaded by palm trees. In the distance, a line of jungle covered hills rise up to a cloudless sky, and smiling ‘Ladies and Gentlemen’ hold out glasses of rum punch, to dull the minds of thankful guests.⁴

An interesting introduction to a decision under the New York Convention by the highest court of a Contracting State. Yet, it is a decision on point in analysis of its sovereign’s obligations under international law and it is on point in its judicial approach to the core provisions of the New York Convention, but for one: it ought not to analyze the effect of Article V, when present with a request pertaining to the recognition and enforcement of the arbitration agreement under Article II. Counsel drew up a smoke curtain by substantiating it with interesting fallacies.

The case is about the termination of an Operating Agreement between the owners of a property, Rose Hall, and the manager of the property, Ritz-Carlton Hotel Company. The agreement contains an arbitration clause providing for arbitration in DC, governed by the laws of the State of Georgia, USA. Rosehall invokes the arbitration agreement in the US and subsequently denies the validity of the agreement in Jamaica when it request an interim injunction from the court requiring Ritz-Carlton to deliver up possession of the resort. Counsel for Rose Hall, presents the following, interesting, arguments:

⁴ *Rose Hall Resort, L.P. v The Ritz-Carlton Hotel Company of Jamaica Limited, Supreme Court of Judicature of Jamaica, 2009 HCV 05413, March 2010, para. 1.*

- ‘There is no defined legal relationship’: according to counsel there is no defined legal relationship on which basis the Ritz-Carlton would have a right to possession of the property. The argument pertains to the merits of the dispute and is either an utter fallacy or counsel fails to understand the mechanics of the New York Convention. The legal relationship between the parties is the operation agreement between the parties.
- Counsel then argues that the subject matter of the dispute - give up possession of the property - is a matter for the courts of Jamaica. This leads the reader to think that counsel has failed to understand the purpose of international arbitration and the principle of party autonomy. Moreover, Article II does not entail a provision similar to Article V(2)(b).
- Finally, counsel proceeds to the possible (non) enforcement of an award rendered in this arbitration, arguing that it could not be enforced in Jamaica because such enforcement would violate the public policy of Jamaica. The court is only asked to recognize an arbitration agreement. If an award is rendered it could be enforced anywhere and such enforcement only has territorial effect. In any event, there is no place for an analysis of Article V under Article II.

The court dismisses the argument and relies heavily on the words of the learned Lord Mustill.

The general principle is, we submit, that any dispute or claim concerning legal rights which can be the subject of an enforceable award is capable of being settled by arbitration. ... The types of remedies which the arbitrator can award are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the State ...nor can he make an award which is binding on third parties or affects the public at large, such as judgment in rem against a ship, an assessment of the rateable value of land, a divorce decree, a winding up order etc.⁵

The Supreme Court of Jamaica correctly appreciate the message of Lord Mustill and the idea of party autonomy: it follows the principle put forth by Lord Mustill: if the parties to the agreement are business parties, a court ought to assume that the parties were fully aware of the implications of an arbitration agreement. With that, the court adopts a ‘hands-off’ approach as does the Miami judiciary: “we are not here to grade papers”.⁶ Courts tend to be less forgiving when the parties are seasoned businessmen.⁷

The court also relies on the landmark decision rendered in the UK, *Fiona Trust v Privolov*.

[T]he construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the

⁵ *Rose Hall Resort, L.P. v The Ritz-Carlton Hotel Company of Jamaica Limited, Supreme Court of Judicature of Jamaica, 2009 HCV 05413, March 2010*, p. 10.

⁶ <https://iccyafnorthamerica.wordpress.com/2016/03/04/icc-yaf-close-friends-or-forbidden-friends/> .

⁷ M.Paulsson, ‘The 1958 New York Convention in Action’ (Wolters Kluwer International 2016), pp. 81-82.

relationship into which they have entered or purported to enter to be decided by the same tribunal. [add footnote and quote from your own book]

It also quotes *Channel Tunnel Group Ltd v Balfour Beatty Construction (1993) 2, W.L.R. 262, 276*:

The purpose of interim measures of protection ... is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute. ... [T]he injunction claimed from the English court is the same as the injunction to be claimed from the panel and the arbitrators, except that the former is described as an interlocutory or interim. In reality its interim character is largely illusory ... and an injunction granted today, would largely preempt the very decision of the panel and arbitrators whose support forms the *raison d'être* of the injunction.⁸

The Court is in point relying on this doctrine as, in the case at bar, the issue is really about an interim measure that is in fact not an interim measure.

The Court proceeds to analyze Article V of the New York Convention as it was raised by counsel for Rosehall. It argued that the court should not recognize the arbitration agreement because it should refuse recognition and enforcement of an award because it was contrary to public policy. There was no need for the court to address this issue as the court only had to review the requirements under Article II which pertains to the recognition and enforcement of an arbitration agreement. Article V relates to the recognition and enforcement of the award that would be rendered once an arbitration agreement is recognized. One ought not to conflate Article II with Article V. Those pertain to different actions under the New York Convention. The court does not dismiss the argument for the reasons mentioned here. Rather, the courts dismisses the argument on the basis that it would only do so if the award would be contrary to conceptions of morality and fairness which was not the case here. In addition it does mention that Article V is available at the enforcement stage, not prior to the award.

III. Resolutions for a well functioning judiciary promoting Jamaica as an arbitral seat

1. Dialogue with the judiciary and policy makers;
2. Applying the New York Convention in accordance with its purpose and spirit;
3. Proper implementation of its text and guidelines on application of rules of interpretation: statutory and treaty;
4. Updating a catalogue of enforcement decisions in the Caribbean in order to ensure transparency and access to understanding the effect of the New York Convention locally;

⁸ *Rose Hall Resort, L.P. v The Ritz-Carlton Hotel Company of Jamaica Limited, Supreme Court of Judicature of Jamaica, 2009 HCV 05413, March 2010*, pp. 11-12.

5. Aligning procedural frameworks with the New York Convention and avoiding excessive formalism;
6. Collaborating with judiciary in other Caribbean jurisdictions in order to ensure a harmonized application of the New York Convention;
7. Aiming for specialization among judges; specialized courts or subsections and training;
8. Enforcing Agreements consistent with international trade: relaxing the 'in writing' agreement;
9. Applying a good faith interpretation of the New York Convention;
10. Defining a narrow concept of public policy or international public policy: "ordre public".

1. *Dialogue with the judiciary and policy makers*

It is of pivotal importance to insist on a dialogue with policy makers. National courts are organs of the State. The judiciary branch ought to operate independently of the other branches - the executive and the legislative. Yet, at the same time, countries - while adhering to the separation of powers - create a system of balances and attempt to harmonize the functioning of the branches. That is in an ideal world. Many States fail to respect the separation of powers and fail to appreciate the importance of the independence of the courts. Courts ought not to be controlled by a ministry of justice whether this is financial, through training mechanisms, appointment processes or otherwise. At the same time, States need to have a legislative branch that provides the right platform for national courts: treaties must be implemented properly in dualist systems. Legislators must provide for a framework of rules of procedures that allows for a fair enforcement procedure. Legislators must enable courts to interpret the provisions of the New York Convention on the basis of rules of treaty interpretation (or at least derived therefrom) and allow courts to interpret treaties on the presumption that both executive and legislative aim to comply with obligations under international law. It is interesting to note that in the Caribbean, the governments - in an attempt to promote the rule of international law and treaty compliance - in an overzealous manner required the ratification of international agreements only after obtaining the enabling legislation from parliament. In a sense, it is good because governments attempt to comply with treaty obligation in making sure that post-ratification, a State will comply with all the obligations resulting from a treaty that is signed on to. The practice of obtaining anticipatory legislation is also widespread in the Caribbean. Delays in state ratification of treaties has often been blamed on the need to secure the prior passage of implementing legislation so as to ensure that the country is not in breach of its treaty commitments.⁹

2. *Applying the New York Convention in accordance with its purpose and spirit*

⁹ Winston Anderson, 'Treaty Making in Caribbean Law and Practice: the question of parliamentary participation'. https://www.cavehill.uwi.edu/researchweek/resources/law/anderson_parliamentaryparticipation.aspx, pp. 94-95.

Kofi Annan, at the occasion of the Convention's 40th birthday, 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.¹⁰ The success of the Convention depends on the attitude towards it by courts, and this cannot be taken for granted. That judicial 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.¹¹

3. *Proper implementation of its text and guidelines on application of rules of interpretation: statutory and treaty*

Jamaica had implemented the New York Convention by Act 20 of 2001, on the 3rd of August, 2001.¹² It implemented the New York Convention's text *ad verbatim*. It appears that Jamaica is, as most Contracting States, a dualist system.¹³ Article (2) of the Constitution provides for it and is a result of British dualism.¹⁴ The Law of Jamaica is the Supreme Law of the Land.¹⁵

None of the written constitutions of the twelve independent states, ostensibly the supreme law of the land, makes provision regarding competence to create international agreements. Indeed, international law and international relations do not feature prominently in the constitutions.¹⁶

A court shall apply its text as part of the laws of Jamaica. With any dualist system, courts may not directly resort to the treaty instructions under the Vienna Convention on the Law of Treaties. Courts rely on statutory rules of interpretation. The Jamaican legislative branch does well to develop guidelines for interpretation of treaties that have been implemented in its national space. They do well to enable national judges to rely on the methods of treaty interpretation that allow for the use of the New York Convention's

¹⁰ See M. Paulsson and F. Nariman, 'The India Resolutions for the 1958 Convention on the Recognition and Enforcement of Foreign Awards', published by the International Council for Commercial Arbitration at <http://www.arbitration-icca.org/media/7/92930493591493/indiareolutions16formatted.pdf>

¹¹ See for a more detailed discussion of the purpose of the New York Convention: M. Paulsson, 'The 1958 New York Convention in Action' (Wolters Kluwer International 2016), pp. 13-15.

¹² See <http://www.newyorkconvention.org/implementing+act+-+jamaica>.

¹³ Winston Anderson, 'Treaty Making in Caribbean Law and Practice: the question of parliamentary participation'. https://www.cavehill.uwi.edu/researchweek/resources/law/anderson_parliamentaryparticipation.aspx, p. 107.

¹⁴ https://www.cavehill.uwi.edu/researchweek/resources/law/anderson_parliamentaryparticipation.aspx.

¹⁵ <https://jis.gov.jm/media/constit.pdf>.

¹⁶ Winston Anderson, 'Treaty Making in Caribbean Law and Practice: the question of parliamentary participation'. https://www.cavehill.uwi.edu/researchweek/resources/law/anderson_parliamentaryparticipation.aspx, p. 78.

drafting history.¹⁷ This would also allow judges to apply the New York Convention on the presumption that a country wants to comply with its obligations under international law. Courts can apply what I call the Charming Betsy Rule and presume that their government and legislature have complied with international obligations.¹⁸ In the case that gave the rule its name, the historic figure of Chief Justice Marshall of the US Supreme Court affirmed that:

An Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.¹⁹

4. *Updating a catalogue of enforcement decisions in the Caribbean in order to ensure transparency and access to understanding the effect of the New York Convention locally.*

The decisions rendered under the New York Convention have been reported by the International Council for Commercial Arbitration since the seventies and have been published in the ICCA Yearbook.²⁰ UNCITRAL has recently embarked upon the reporting of New York Convention decisions as well.²¹ However, there is only one decision from Jamaica reported in 2010.²² In order for foreign parties to request the enforcement of awards in Jamaica, access needs to be given to local decisions on either enforcement of awards under the New York Convention, enforcement of foreign awards under a domestic regime, enforcement of domestic awards. Access to those decisions are best provided through internationally recognized databases such as the ICCA Yearbook and www.newyorkconvention.org. If little case law is available, a Contracting State does well to provide a guide on enforcement under the New York Convention locally.

5. *Aligning procedural frameworks with the New York Convention and avoiding excessive formalism.*

The drafters of the New York Convention attempted to design a procedural framework especially for enforcement of awards under the treaty. However, given that nothing is as divergent as procedural laws, the delegates could not reach an agreement as to what such a procedural framework should look like. Choosing for the applicability of either the rules of procedure for the enforcement of domestic awards or foreign awards did not work either. Therefore, the drafters decided to defer to the Contracting States. Article III of the New York Convention provides that the courts of the Contracting States shall

¹⁷ See for an outline of interpretation by national judges: M.Paulsson, 'The 1958 New York Convention in Action' (Wolters Kluwer International 2016), Chapter 2.

¹⁸ M.Paulsson, 'The 1958 New York Convention in Action' (Wolters Kluwer International 1958), pp. 57-58.

¹⁹ *Murray v. Schooner Charming Betsy*, 6 (2 Cranch) 64, 118 (1804). See also M.Paulsson, 'The 1958 New York Convention in Action' (Wolters Kluwer International 1958), p. 58.

²⁰ <http://www.arbitration-icca.org/publications.html>.

²¹ <http://newyorkconvention1958.org>.

²² See for the full text:

<http://www.newyorkconvention.org/court+decisions/decisions+per+topic/jamaica+1>.

enforce awards as binding on the basis of the rules of procedure of the country where enforcement is sought. It is pivotal for courts to apply any rule of procedure within the spirit of the New York Convention. Rules of procedure should not be used as a stopper to enforcement as is the case in the US Second Circuit by relying on the doctrine of *Forum Non Conveniens*.²³

6. *Collaborating with judiciaries in other Caribbean jurisdictions in order to ensure a harmonized application of the New York Convention.*

The purpose of the New York Convention is to harmonize the enforcement of foreign arbitral awards worldwide. To reiterate Kofi Annan on the New York Convention:

This landmark instrument has many virtues. It has nourished respect for binding commitments, whether they have been entered into by private parties or government. It has inspired confidence in the rule of law. And it has helped ensure fair treatment when disputes arise over contractual rights and 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.²⁴

And Lord Mustill:

The New York Convention ‘perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law’.²⁵

Jurisdictions in the Caribbean do well to remember that the delegates in 1958 came together for that purpose: harmonization, application of the rule of law and promoting international trade. To honor that wish, one must collaborate across borders.

7. *Aiming for specialization among judges; specialized courts or subsections and training.*

Switzerland has specialized courts, so does Panama. Brazil has the Superior Court of Justice that handles arbitration matters. Miami has established a specialized arbitration section as part of the 11th Judicial State Court. Such specialization promotes proper and uniform application of the New York Convention in a jurisdiction. Specialization needs

²³ *Figueiredo Ferraz Engenharia De Projecto Ltda. v. The Republic of Peru, Ministerio de Vivienda Construccion y Saneamiento, Programa Agua Para Todo (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) (2nd Cir. 2011), 2011, US App. Lexis 24748. See also M.Paulsson, ‘The 1958 New York Convention in Action’ (Wolters Kluwer International 1958), pp. 126-132.*

²⁴ Kofi Annan, “Opening address commemorating the successful conclusion of the 1958 United Nations Conference on International Commercial Arbitration,” in *Enforcing Arbitration Awards under the New York Convention - Experience and Prospects*, 1 (United Nations 1999).

²⁵ Michael Mustill, *Arbitration: History and Background*, 6 J. Intl. Arb. 43 (1989).

to be paired with training and judicial dialogues. Many of those have been conducted by the International Council for Commercial Arbitration.²⁶

8. *Enforcing Agreements consistent with international trade: relaxing the ‘in writing’ agreement*

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.²⁷

9. *Applying a good faith interpretation of the New York Convention.*

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 Jamaica 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.²⁸

10. *Defining a narrow concept of public policy or international public policy: “ordre public”*

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 State to respect its obligations towards other States or international organizations.²⁹

²⁶ http://www.arbitration-icca.org/NY_Convention_Roadshow.html.

²⁷ See M.Paulsson and F. Nariman, ‘The India Resolutions for the 1958 Convention on the Recognition and Enforcement of Foreign Awards’, published by the International Council for Commercial Arbitration at <http://www.arbitration-icca.org/media/7/92930493591493/indiaresolutions16formatted.pdf>.

²⁸ See M.Paulsson and F. Nariman, ‘The India Resolutions for the 1958 Convention on the Recognition and Enforcement of Foreign Awards’, published by the International Council for Commercial Arbitration at <http://www.arbitration-icca.org/media/7/92930493591493/indiaresolutions16formatted.pdf>.

²⁹ International 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.

In conclusion, this paper serves as a position paper for members of the Jamaican community, hoping that it provides highlighted and mere succinct insights into the intricacies of the New York Convention and the role the judiciary could play, as it may further Jamaica's rise to becoming an arbitral hub in the Caribbean. It is hoped that arbitration will thrive and that it will relieve the courts from an overwhelming caseload.. Yet, trust in arbitration is only guaranteed if judges are the guardians of that system.