

# The Urgency of Not Revising the New York Convention

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## I. INTRODUCTION

As with its fortieth anniversary, the celebration of the fiftieth anniversary of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has justifiably given rise to questions as to the necessity and/or feasibility of the Convention's revision. To date, the majority view has been in favor of not opening such an avenue.<sup>1</sup> Today, however, important scholars have suggested that the Convention has aged in such a way and has given rise to a sufficiently large number of unsatisfactory decisions that the time has come to initiate a revision process.<sup>2</sup> A preliminary draft has been put forward to stimulate reflection on the subject.<sup>3</sup>

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1. See for example G. HERMANN, "The 1958 New York Convention: Its Objectives and Its Future" in *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, ICCA Congress Series no. 9 (1999) (hereinafter *ICCA Congress Series no. 9*) p. 15; A.J. VAN DEN BERG, "The Application of the New York Convention by the Courts" in *ICCA Congress Series no. 9*, p. 34; A.J. VAN DEN BERG, "Striving for Uniform Interpretation" in *Enforcing Arbitration Awards Under the New York Convention: Experience and Prospects* (United Nations Publication 1999) p. 42; W. MELIS, "Considering the Advisability of Preparing an Additional Convention, complementary to the New York Convention" in *ibid.*, p. 44; P. SANDERS, "A Twenty Year's Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards", 13 *The International Lawyer* (1979) p. 269 et seq.; J. PAULSSON, "L'exécution des sentences arbitrales dans le monde de demain", *Rev. arb.* (1998) pp. 637-652; J. PAULSSON, "Towards Minimum Standards of Enforcement: Feasibility of a Model Law" in *ICCA Congress Series no. 9*, p. 575.
2. See, in particular, A.J. VAN DEN BERG's Explanatory Note, this volume, pp. 649-666. See also 11th IBA International Arbitration Day, *The New York Convention: 50 Years*, 1 February 2008 at <[www.uncitral.org/pdf/uncitral/NYarbdav-programme.pdf](http://www.uncitral.org/pdf/uncitral/NYarbdav-programme.pdf)> (last accessed 21 August 2008). For a comprehensive review of the case law generated on the basis of the Convention, see E. GAILLARD and D. DI PIETRO, eds., *Enforcement of Arbitration Agreements and International Arbitral Awards* (Cameron May 2008).
3. See the text of the Hypothetical Draft Convention proposed by A.J. VAN DEN BERG, this volume, pp. 667-669.

Although its language is at times dated and certain of its provisions could be modernized,<sup>4</sup> the New York Convention continues, on the whole, to fulfill its purpose in a satisfactory manner and there would be, in my opinion, more to lose than to gain in embarking upon a revision process. Should a revision nevertheless be considered by the States parties to the New York Convention, it could not simply embrace the suggestions found in the Hypothetical Draft prepared for the purposes of this Conference.

## II. IS THERE A NEED TO REVISE THE NEW YORK CONVENTION?

The reason why I strongly believe that the New York Convention should be left alone is threefold. It can be summarized by what I call the “three NOs”: there is no need, no hope and no danger.

### 1. *There is No Need to Revise the New York Convention*

The sole fact that the language of the Convention is at times outdated and that some of its provisions could be fine-tuned does not warrant embarking upon a revision of an instrument binding on 144 States at the time of this writing. Such a massive undertaking would be justified only if one were to identify serious flaws in the enforcement process and ascertain that those flaws can be cured by a mere modification of the language used in the instrument.<sup>5</sup>

Put in perspective, there are only two serious issues regarding the enforcement of awards, none of which can be fixed by a revision. The first difficulty stems from recurring instances of bias in favor of local companies, in particular State-owned companies, by the courts in certain jurisdictions at the place of enforcement. However, what revision would prevent the Russian courts (which have shown little evidence of independence in the recent Yukos or TNK-BP sagas) from refusing to enforce an award affecting the interests of a State-owned company of the Russian State itself on the ground

4. For example, Art. II(3) could be clarified in that courts confronted with a dispute covered by an arbitration agreement should limit their determination of whether the arbitration agreement is “null and void, inoperative or incapable of being performed” to a prima facie review. Art. V, which sets forth the grounds for refusing recognition or enforcement of an award, is somewhat convoluted. It could be both simplified and modernized in the following manner: first, the reference to the “law of the country where the award was made” with respect to the validity of the arbitration agreement (Art. V(1)(a)) or with respect to the composition of the arbitral tribunal (Art. V(1)(d)) is outdated; second, Art. V(1)(c), which provides that the recognition or enforcement of an award can be refused if “the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, [it] was made”, should be removed or, at the very minimum, limited in scope. Finally, the issue of arbitrability under Art. II(1) and Art. V(2)(a) could also be modernized.
5. The 2008 PricewaterhouseCoopers report on *International Arbitration: Corporate Attitudes and Practices* does not suggest any such difficulties. It reveals, in relation to recognition and enforcement of arbitral awards, that “[t]he majority of [surveyed] corporations that had enforced awards reported that they had not encountered major difficulties in doing so”, at <[www.pwc.co.uk/pdf/PwC\\_International\\_Arbitration\\_2008.pdf?utr=1](http://www.pwc.co.uk/pdf/PwC_International_Arbitration_2008.pdf?utr=1)> (last accessed 21 August 2008) p. 6.

of an alleged violation of public policy?<sup>6</sup> The public policy exception will always be present and the courts of the place of enforcement will always be in a position to manipulate that ground to refuse enforcement.

The second and very serious problem is that of States that conclude arbitration agreements, lose in the arbitration and never satisfy the award. The *SEEE v. Yugoslavia* award, for example, took twenty-eight years to be enforced.<sup>7</sup> The *Noga* case provides another striking example of the losing State's abusive resistance to enforcement.<sup>8</sup> These difficulties have no relation whatsoever with the New York Convention but result solely from the State's ability to invoke its immunity from execution to resist enforcement. They could effectively be resolved through an international instrument. Yet, no significant progress was made in this respect in the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property.<sup>9</sup>

6. See the Report of the Committee on Legal Affairs and Human Rights, "The Circumstances surrounding the Arrest and Prosecution of Leading Yukos Executives", S. LEUTHEUSSER-SCHNARRENBURGER, Parliamentary Assembly, Council of Europe (November 2004, doc. 10368); Report on Economic Affairs and Development, "Europe's Interest in the Continued Economic Development of Russia", K. SASI, Parliamentary Assembly, Council of Europe (September 2006, doc. 11026) para. 57; E. S. BERGER, "Corruption in Russia's Arbitrazh Courts", 14 BNA'S Eastern Europe Reporter (2004, no. 12); E. S. BERGER, "Corruption in the Russian Arbitrazh Courts: Will there be Significant Progress in the Near Term?", 38 The International Lawyer (2004, no. 1); "The Judicial System of the Russian Federation: a System-Crisis of Independence", Report of the NGO RUSSIAN AXIS (2004).
7. Award of 2 July 1956, 25 Int'l L. Rep. (1957) p. 761. For a Swiss decision, see Trib. Vaud, 12 February 1957 (*Société Européenne d'Etudes et d'Enterprises v. République Fédérative de Yougoslavie*), Rev. Crit. Dr. Int. Pr. (1958) p. 359; for a Dutch decision, see *Hoge Raad*, 26 October 1973, as translated by G. GAJA, 5 International Commercial Arbitration (1978) p. 18; for a French decision, see *Cour de cassation*, 1st Civil Chamber, 18 November 1986 (*Etat français v. Société européenne d'études et d'entreprises (S.E.E.E.) et autres*), 26 International Legal Materials (1987) p. 373. See also, G. R. DELAUME, "*SEEE v. Yugoslavia*: Epitaph or Interlude?", 4 Journal of International Arbitration (1987, no. 3) p. 25.
8. *Ambassade de la Fédération de Russie en France et al. v. Compagnie Noga d'Importation et d'Exportation*, Rev. arb. (2001) p. 116; Court of Appeal, Paris 1st Civil Chamber, 22 March 2001, Rev. arb. (2001) p. 607; United States Court of Appeals, Second Circuit, 16 March 2004 (*Compagnie Noga d'Importation et d'Exportation S.A. v. The Russian Federation*) ICCA Yearbook Commercial Arbitration XXIX (2004) pp. 1227-1250. For an overview of the *Noga* arbitration and litigation in French and American courts, see N.B. TURCK, "French and US Courts Define Limits of Sovereign Immunity in Execution and Enforcement of Arbitral Awards", 17 Arbitration International (2001, no. 3) p. 327 et seq.
9. See General Assembly Resolution 59/38, annex, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49 (A/59/49)*, 2004. See also H. FOX, "State Immunity and the New York Convention" in E. GAILLARD and D. DI PIETRO, eds., *op. cit.*, fn. 2, p. 829; E. GAILLARD, "Effectiveness of Arbitral Awards, State Immunity from Execution and Autonomy of State Entities, Three Incompatible Principles" in E. GAILLARD and J. YOUNAN, eds., *State Entities In International Arbitration, IAI Series on International Arbitration No. 4* (Juris Publishing 2008) p. 179.

2. *There is No Hope to Achieve a Better Instrument Than the Existing Convention*

There is no hope, in the current environment, that a significant number of the 144 States parties to the Convention (at the time of this writing) would agree to make the enforcement process more efficient.

The pro-arbitration bias which has been the prevailing state of mind in a number of States in the past decades has been somewhat undermined by the dramatic development of arbitrations based on investment protection treaties. States being, by definition, in the position of a defendant in such arbitrations, they have tended to develop a defendant mindset.<sup>10</sup> In this context, it is doubtful whether a large number of States, which are increasingly in a position to resist enforcement of awards, would be genuinely willing to enhance the effectiveness of the enforcement process. Against that background, it is not even certain that the degree of liberalism achieved in 1958 could be attained today.

3. *There is No Danger in Leaving the Current Instrument Untouched*

On the other hand, there is no danger in leaving the New York Convention in its current state. The genius of the Convention is to have foreseen the evolution of arbitration law. As per its Art. VII, the Convention sets only a minimum standard. States can always be more liberal. By definition, the Convention cannot freeze the development of arbitration law. Thus, there is no danger in leaving it untouched.

The assessment of the efficiency of the enforcement of awards in today's world cannot be made by considering solely the New York Convention case law. In some of the most pro-arbitration jurisdictions such as France, the number of cases referring to the New York Convention is scarce precisely because the ordinary rules governing enforcement of awards in France are more liberal than those of the Convention and are routinely applied without any need to refer to the Convention.<sup>11</sup> The Convention is there as a safeguard. It does not need to be used, but it does no harm.

10. See, for example, S. SCHWEBEL, "The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law" in *Global Reflections on International Law, Commerce and Dispute Resolution* (ICC Publishing 2005) p. 815 et seq. The regression of the pro-arbitration bias in the United States is also evidenced by the legislative progress of the Arbitration Fairness Act of 2007 [A bill to amend chapter 1 of title 9 of United States Code with respect to arbitration], which restricts significantly the arbitrability of a number of matters, including pre-dispute arbitration agreements to arbitrate disputes "arising under any statute intended ... to regulate contracts or transactions between parties of unequal bargaining power", as well as the principle of the autonomy of the arbitration agreement and that of competence-competence. At the time of writing, the Bill had been introduced into the Senate (12 July 2007) and undergone hearings in the Committee on the Judiciary Subcommittee on the Constitution (12 December 2007); see, Sect.4.2, Fairness Arbitration Act of 2007, Library of Congress, at <<http://thomas.loc.gov/cgi-bin/bdquery/z?d110:s.01782>> (last accessed 21 August 2008).

11. *Cour de cassation*, 1st Civil Chamber, 29 June 2007 (*Société Putrabali Adyarnulia v. Société Rena Holding et Société Mnogutia Est Espices*) Rev. arb. (2007) p. 507; *Cour de cassation*, 1st Civil Chamber, 23 March 1994, Rev. arb. (1994) p. 327, note Ch. JARROSSON, p. 328.

Should one conclude that it would be useful to modernize the grounds for the review of awards by national courts, the first candidate for a revision would be Art. 34 of the UNCITRAL Model Law on International Commercial Arbitration which sets out the grounds for the setting aside of awards. In 1985, the drafters of the Model Law chose not to revisit the annulment grounds in Art. 34 but simply track those found in Art. V of the New York Convention. Presumably, some progress in the drafting of those grounds – which correspond to the grounds to refuse enforcement in the Convention – could be achieved. The modernization of those grounds in Art. 34 would enable States to adopt a new set of standards regarding the setting aside of awards, which could easily be transposed for the purposes of the recognition and enforcement of awards pursuant to each jurisdiction's ordinary rules, while keeping the New York Convention as a minimum standard. In so doing, one could achieve modernization of the grounds for the review of awards without jeopardizing the delicate balance struck in the New York Convention.

### III. SHOULD A REVISION BE NEVERTHELESS CONTEMPLATED, IT SHOULD STRIKE A DIFFERENT BALANCE

The Hypothetical Draft Convention proposed for the purposes of discussion in this Conference is clearly thoughtful and internally consistent. In my opinion, however, it does not achieve the desired balance.

The title itself is telling: it is a proposed convention on the “international enforcement of arbitral awards”, whereas it should be a convention on the “enforcement of international arbitral awards”. What is “international” is the award, not the enforcement.

More fundamentally, the gist of the Hypothetical Draft Convention is to adopt a purely traditional choice of law approach, which consists in allocating the issues which may arise in the context of the enforcement of an arbitration agreement or an arbitral award essentially between the law of the seat and the law of the place of enforcement. The law of the seat is mentioned seven times in the Hypothetical Draft Convention. It would essentially govern the arbitration agreement and, on a subsidiary basis, the composition of the arbitral tribunal and the arbitral procedure. The law of the place of enforcement is mentioned three times and, understandably, would govern international public policy, including arbitrability.

This systematic use of a choice of law approach is highly problematic. The least one would expect from a convention elaborated at the beginning of the twenty-first century – whose purpose is to facilitate the enforcement of arbitration agreements and arbitral awards – is to develop internationally acceptable standards and not merely distribute matters between the law of the seat and that of the place of enforcement, irrespective of their content, degree of liberalism or sophistication.

Such a criticism equally applies to the proposed rules regarding the arbitration agreement and those regarding the recognition of the award.

### 1. *The Arbitration Agreement*

According to the Hypothetical Draft Convention, the courts seized of a dispute should refer such dispute to arbitration if “there is *prima facie* no valid arbitration agreement under the law of the country where the award will be made”.<sup>12</sup> I concur whole-heartedly with the *prima facie* test, which I have long advocated. That is the whole idea of the negative effect of competence-competence.<sup>13</sup>

However, the reference to the law of the seat as the governing law of the arbitration agreement is misplaced. It is not a good connecting factor for the arbitration agreement. Further, it takes away most of the benefit of the limitation of the assessment of the existence and validity of the arbitration agreement to a *prima facie* test.

One can easily anticipate the difficulties associated with the use of a *prima facie* test in a system based on a choice of law approach. The question arises in situations in which one of the parties engaged in a dispute before a court invokes an arbitration agreement while the other party opposes the reference of the dispute to arbitration. That court must determine *prima facie* if the arbitration agreement is valid and binding on the relevant parties. If, following the proposed Hypothetical Draft Convention, the court has to apply to this issue the law of the seat of the arbitration, it may find itself in an impasse in all cases in which the seat has not been selected at that stage. Presuming the seat has been selected, either in the arbitration agreement or pursuant to the mechanisms contemplated in the relevant arbitration rules, the matter is still significantly complicated by the requirement of resorting to the law of the seat. In many instances, that law will be foreign to the court seized of the matter and may well have to be evidenced by way of expert witnesses. In all likelihood, each party will present experts with diverging views. Lengthy expert testimonies may ensue and it is easy to predict that the simplest arbitration clause will give rise to convoluted discussions based on alleged theories found only in the law of the seat.

In reality, *prima facie* means *prima facie*. The court seized of the matter can assess the arbitration agreement on its face. It can determine if the agreement exists as between the parties and has been entered into in circumstances which are not manifestly aberrational. Nothing further is required and any argument going beyond such a simple assessment on the basis of generally accepted practices should be left to the arbitrators to decide in the first instance. This is why *prima facie* and the requirement of reasoning in choice of law terms are hardly compatible.

### 2. *The Arbitral Award*

In 1958, the tension between those who wanted to deal with “international” awards (which calls for a substantive rules methodology) and not with the “foreign” awards

12. Art. II(2)(b) of the Hypothetical Draft convention, this volume, pp. 667-669.

13. See, for example, E. GAILLARD and Y. BANIFATEMI, “Negative Effect of Competence-Competence, The Rule of Priority in Favour of the Arbitrators” in E. GAILLARD and D. DI PIETRO, eds., *op. cit.*, fn. 2, p. 257, and references cited therein.

(which calls for a choice of law approach) resulted in a compromise.<sup>14</sup> This compromise consisted, as far as the validity of the arbitration agreement, the composition of the arbitral tribunal and the arbitral procedure are concerned in the context of the enforcement of the award, in downgrading the law of the seat of the arbitration to a subsidiary position applicable only absent an agreement between the parties. This was a major step as compared to the mandatory application of the law of the seat found in the Geneva Conventions of 1923 and 1927. The Hypothetical Draft Convention does not entail any progress in this respect. The progress would be to remove the reference to the law of the seat. What is at stake are “international” awards, not “Swiss” or “Indian” awards.

As to the difficult issue of the enforcement of an award set aside in the country in which the arbitration took place, the Hypothetical Draft does not achieve any significant progress either. To permit the recognition of awards set aside by the courts of the seat of the arbitration on the basis of grounds other than those which are generally accepted and found in the Convention is not going to solve the problem of awards conveniently set aside for the benefit of the local party, often the State or a State-owned entity (as in *TermoRio* in Colombia or *Bechtel* in Dubai).<sup>15</sup> If the Hypothetical Draft Convention were to be adopted, parties seeking to exploit the fact that the arbitration took place in their own country and to have their courts annul the award with a view to resist enforcement elsewhere would simply have to become a little more savvy. They would have to seek the annulment of the award on the basis of an accepted ground, but since those grounds necessarily include the violation of due process or international public policy, their task would not be too difficult. They would simply have to argue that, in the case at hand, such a violation took place. If successful, for good or bad reasons, the net result of the Hypothetical Draft Convention would be to give an international effect to such decisions even if they are designed to rescue the local party. The impact of parochial decisions would not have been taken care of, quite to the contrary.

One has to recognize that a court wanting to favor the local party can not only use a ground to set aside which is not generally accepted (for instance, in *Chromalloy*, the fact that the award allegedly misapplied administrative law)<sup>16</sup> but also misapply in a much more subtle way grounds which are generally accepted (due process and international public policy being the easiest to manipulate). Why should the court where the money

14. On the negotiating history of the New York Convention, see, e.g., Robert BRINER and Virginia HAMILTON, “The History and General Purpose of the Convention. The Creation of an International Standard to Ensure the Effectiveness of Arbitration Agreements and Foreign Arbitral Awards” in E. GAILLARD and D. DI PIETRO, eds., *op.cit.*, fn. 2, p. 3.

15. *Consejo de Estado de Colombia, Sala de lo Contencioso Administrativo, Sección Tercera*, 1 August 2002 (*Electrificadora del Atlántico S.A. E.S.P. v. TermoRio S.A. E.S.P.*) expte. 11001-03-25-000-2001-004601 (21041); Dubai Court of Cassation, 15 May 2004 (*Int'l Bechtel Co. Ltd. v. Dep't of Civil Aviation of Gov't of Dubai*) (*Bechtel*). For decisions relating to *Bechtel* in American and French Courts, see, *In re Arbitration Between Intern. Bechtel Co., Ltd. and Department of Civil Aviation of the Government of Dubai*, 360 F.Supp.2d 136 (DDC 2005) and Paris Court of Appeal, 29 September 2005 (*Bechtel*), *Rev. arb.* (2006) p. 695, note H. MUIR-WATT.

16. Cairo Court of Appeal, 5 December 1995 (*Ministry of Defence v. Chromalloy Aero Services Company*), *Rev. arb.* (1998) p. 723, note Ph. LÉBOULANGER.

is attached defer to the decision of the court in which the arbitration took place, especially when this place is the home country of one of the litigants? The Hypothetical Draft Convention simply fails to address this crucial problem.

In short, the issues raised by a potential revision of the New York Convention are much more intricate and likely to be highly controversial than one would expect at first sight. Against that background, the inescapable conclusion is that it is absolutely urgent to do nothing.



# Comments on the Proposal to Amend the New York Convention

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## I. INTRODUCTION

I support Albert Jan van den Berg's proposal to amend the 1958 New York Convention, recognizing of course that achieving such an amendment would face significant political and practical challenges. These challenges include the following:

- Reaching agreement among the 144 States parties to the New York Convention (at the time of this writing) on its amendment;
- Each of the State parties may need to enact implementing legislation;
- The need for a transition period while some States will have implemented the changes but others have not, in order to permit the adequate functioning of the system in the interim. During this transition it will be a challenge to work with different parallel regimes.

I would like to start my analysis by looking back at the negotiating history of the New York Convention and specifically a marvelous summary that Albert Jan van den Berg included in his Pace Law Review article.<sup>1</sup> I want to quote just one or two things from the history that set out what objectives were identified as the most important. Then I want to test whether that is where we are in terms of the developing jurisprudence.

The Summary Records of the United Nations Conference on International Commercial Arbitration held in New York in May and June 1958<sup>2</sup> indicate what the negotiators sought, for example:

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1. Albert Jan VAN DEN BERG, "When is an Arbitral Award Nondomestic Under the New York Convention of 1958?", 6 Pace L. Rev. (1985) p. 25 at p. 36.
2. The *travaux préparatoires* of the New York Convention, including the Summary Records of the New York Convention of May and June 1958 and the preceding work of the United Nations Economic and Social Council and United Nations Secretariat, are reprinted in G. GAJA, ed., *International Commercial Arbitration: New York Convention*, Binder 1 (1985). They are also available on the Internet at: <[www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_travaux.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_travaux.html)>.

“... the best solution would be for the internal laws of countries to be standardized by the adoption of a uniform law...”<sup>3</sup>

I don't think we have seen that happen, despite the fact that (at the time of this writing) 70 domestic legislatures have enacted legislation based on the UNCITRAL Model Law on International Commercial Arbitration (the Model Law).<sup>4</sup> Secondly, it was considered

“... most important that each signatory State should know exactly what the other States were undertaking to do”.<sup>5</sup>

I am not sure we have that. And, third, it was thought to be

“... essential that an absolutely clear criterion, incapable of divergent interpretations, should be established”.<sup>6</sup>

I will prove we do not have that.

Indeed, the Convention is not “absolutely clear” nor is it “incapable of divergent interpretations”. In various cases, many lawyers have spent thousands of pages and even more hours arguing to the courts and litigating certain issues under the provisions of the existing Convention. Some of those issues are the following:

- (1) The meaning of the word “may” under Art. V(1): How much discretion does it confer to the court to refuse recognition and enforcement? What is the extent of what the court may do?
- (2) Whether, under the specific language of an arbitration clause, the enforcement forum must respect the decision to set aside the award of the forum “in which, or under the law of which, that award was made” given a complete divergence of views as to the meaning – and application – of the words “in which” and “under the law of which” under Art. V(1)(e).
- (3) The meaning of “contrary to the public policy of that country” under Art. V(2)(b): As one examines the decisions rendered by national courts under the provisions of the existing New York Convention, it is difficult to discern whether the inconsistency is, as Teresa Cheng noted, due to differences in the courts' approach.<sup>7</sup> A review of the decisions, admittedly, reveals a good deal of confusion – if not incompetence – on the part of many national courts. Inconsistencies may, however, also be due to a parochial approach by national courts seeking to protect domestic interests. I think we have all

3. U.N. Doc. E/CONF.26/SR.6 (12 Sept. 1958) p. 9 (summarizing the statement of the Colombian delegate).

4. For updates on the status of enactment of the UNCITRAL Model Law, see: <[www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html)>.

5. U.N. Doc. E/CONF.26/SR.6 (12 Sept. 1958) p. 9 (summarizing the statement of the Colombian delegate).

6. *Ibid.*

7. “Celebrating the Fiftieth Anniversary of the New York Convention”, this volume p. 679-688, at pp. 683-684.

seen that in decisions, and in litigation. Or is it confusion by counsel as to what the appropriate words mean? Or is it just aggressive advocacy arguing for individual advantage, as Emmanuel Gaillard suggests?<sup>8</sup>

I would now like to examine the real inconsistency among court decisions in various jurisdictions that have taken diametrically opposed positions as to whether an arbitral award that has been set aside in its country of origin may be enforced elsewhere.

We are all familiar with some of the cases decided in favor of enforcing a vacated award. I will discuss some of these first, before turning to cases in which courts declined to enforce a vacated award.

Thus, in *Pabalk v. Norsolor*,<sup>9</sup> the French *Cour de Cassation* ruled that an ICC award annulled at the arbitral seat (in Vienna) may be enforceable in France because Art. VII allowed the award creditor to avail itself of the award to the extent allowed by the laws of the enforcement forum, and French civil procedure allowed for such enforcement.<sup>10</sup> The *Cour de Cassation* went on to state that the French court “had a duty to determine, even *ex officio*, if French law would not allow [the award creditor] to avail itself of the award at stake”.<sup>11</sup>

Ten years later, the proceedings in the courts of France, Switzerland and the United Kingdom in the well-known *Hilmarton* case highlighted the problem that can result from the enforcement of an arbitral award that has been set aside in its country of origin, as well as the lack of consistency in interpreting and applying the same language (“public policy”) of the New York Convention. The dispute in that case centered on the claim of Hilmarton Ltd., a UK consulting firm, against the French company Omnimium de Traitement et de Valorisation (OTV) for payment of consultancy fees. Having lost in its ICC arbitration in Geneva against OTV in 1988, Hilmarton successfully applied to the Geneva Court of Appeal to have the arbitral award annulled.<sup>12</sup> OTV appealed to the Swiss Federal Tribunal and, in addition, sought enforcement of the annulled award in Paris. Before the Swiss Federal Tribunal ruled on OTV’s appeal (which it later rejected), the Paris Tribunal of First Instance granted OTV’s request for enforcement. Upon appeal, the Paris Court of Appeal upheld the enforcement decision,<sup>13</sup> and Hilmarton appealed further to the French *Cour de Cassation*.

In the meantime, the Swiss Federal Tribunal had rejected OTV’s appeal and affirmed the Geneva court’s annulment of the award.<sup>14</sup> Hilmarton thereupon instituted a second ICC arbitration against OTV in Geneva, which resulted in an award in Hilmarton’s favor in 1992. Hilmarton then sought to enforce in France both the second ICC award and the

8. “The Urgency of Not Revising the New York Convention”, this volume, pp. 689-696.

9. *Pabalk Ticaret Limited Sirketi v. Norsolor S.A.*, *Cour de Cassation*, France (9 Oct. 1984), reported in *ICCA Yearbook Commercial Arbitration* XI (1986) (hereinafter *Yearbook*) p. 484.

10. *Ibid.*, at p. 489.

11. *Ibid.*, at pp. 489, 491.

12. *Hilmarton v. Omnimium de Traitement et de Valorisation*, *Cour de Justice du Canton de Genève* (17 Nov. 1989), reported in *Yearbook* XIX (1994) pp. 214, 215, 218.

13. *Hilmarton Ltd. v. Omnimium de Traitement et de Valorisation*, *Cour d’Appel*, Paris (19 Dec. 1991), reported in *Yearbook* XIX (1994) p. 655.

14. *Omnium de Traitement et de Valorisation v. Hilmarton*, *Tribunal Fédéral*, Switzerland (17 Apr. 1990), reported in *Yearbook* XIX (1994) pp. 214, 219, 221.

Swiss Federal Tribunal's decision annulling the first award. The Court of First Instance of Nanterre granted both requests for enforcement in 1993,<sup>15</sup> and OTV appealed to the Court of Appeal of Versailles.

In the still pending appellate proceeding before the French *Cour de Cassation* concerning enforcement of the first (annulled) ICC award, Hilmarton argued, among other grounds, that the court should refuse to recognize and enforce that award as a matter of public policy under Art. V(1)(e) of the New York Convention given that it had been set aside in its country of origin. In its decision of 23 March 1994, the *Cour de Cassation*, however, disagreed finding that under Art. VII of the New York Convention, OTV could invoke the more favorable provision of Art. 1502 of the French New Code of Civil Procedure, which did not include the ground of Art. V(1)(e) among the grounds for an appeal against a decision granting recognition and enforcement.<sup>16</sup> The *Cour de Cassation* also held that the first ICC award was "an international award which is not integrated in the legal system of [Switzerland], so that it remains in existence even if set aside [in Switzerland] and its recognition in France is not contrary to international public policy".<sup>17</sup>

Notwithstanding this final decision of the highest French court, the Court of Appeal of Versailles, more than one year later, reached essentially the opposite conclusion, rejecting OTV's appeals and thus affirming the Nanterre court's decisions to recognize and enforce both the second ICC award and the Swiss Federal Tribunal's decision to set aside the first ICC award.<sup>18</sup> On further appeal, the *Cour de Cassation* in 1997 reversed the decisions of the Versailles Court of Appeal holding that "a final French decision bearing on the same subject between the same parties creates an obstacle to any recognition in France of court decisions or arbitral awards rendered abroad which are incompatible with it".<sup>19</sup>

Having exhausted its remedies in France, Hilmarton then turned to the English courts and there obtained recognition and enforcement of the second ICC award in 1999.<sup>20</sup> Of note, the English High Court rejected OTV's argument that enforcement of the award would be contrary to public policy, finding that "of course only . . . English public policy" (not international public policy) was relevant.<sup>21</sup> As Pierre Mayer succinctly summarized the outcome: "The current situation is thus the following: France recognises only the first

15. *Hilmarton Ltd. v. Omnium de Traitement et de Valorisation*, Tribunal de Grande Instance, Nanterre (22 Sept. 1993), reported in *Yearbook XX* (1995) p. 194.

16. *Hilmarton Ltd. v. Omnium de Traitement et de Valorisation*, Cour de Cassation, France (23 Mar. 1994), reported in *Yearbook XX* (1995) pp. 663, 664-665.

17. *Ibid.*, at p. 665.

18. *Omnium de Traitement et de Valorisation v. Hilmarton Ltd.*, Cour d'Appel, Versailles (29 June 1995), reported in *Yearbook XXI* (1996) p. 524.

19. *Omnium de Traitement et de Valorisation v. Hilmarton Ltd.*, Cour de Cassation (10 June 1997), reported in *Yearbook XXII* (1997) p. 696 at p. 697.

20. *Omnium de Traitement et de Valorisation S.A. v. Hilmarton*, High Court of Justice, Queen's Bench Division (Commercial Court) (24 May 1999), reported in *Yearbook XXIVa* (1999), p. 777.

21. *Ibid.*, at p. 779.

award, rendered in favour of the French company; England recognises only the second award, rendered in favour of the English company.”<sup>22</sup>

In the United States, we have the *Chromalloy* case,<sup>23</sup> where the United States District Court for the District of Columbia enforced an arbitral award made in Egypt and under Egyptian law, although the Egyptian Court of Appeal had set aside the award. The US court based its decision on the grounds that Art. V makes refusal to enforce only discretionary and that Art. VII<sup>24</sup> enables a secondary jurisdiction to enforce because recognizing the decision of the Egyptian court would violate clear US public policy in favor of final and binding arbitration of commercial disputes.<sup>25</sup> Specifically, the court found that Art. VII allowed the award creditor to maintain all rights to recognition and enforcement that the creditor would have under domestic law if the Convention did not exist.<sup>26</sup> Finding that Art. VII “mandates that this Court *must* consider [Chromalloy’s] claims under applicable US law”,<sup>27</sup> the court then analyzed the award under the US Federal Arbitration Act and concluded that no ground for setting aside the award existed under the Act, and the award therefore was proper under U.S. law.<sup>28</sup> The court rejected Egypt’s argument that the court should grant *res judicata* effect to the decision of the Egyptian Court of Appeal on the ground that doing so would violate the United States’ “emphatic federal policy in favor of arbitral dispute resolution”.<sup>29</sup>

I note that this was a case of first impression before the United States District Court for the District of Columbia, and the *Chromalloy* court’s decision does not show that the court had any knowledge of the earlier decisions of the French courts, or of any other non-US courts, interpreting the New York Convention.<sup>30</sup>

Incidentally, as *Chromalloy* also brought enforcement proceedings in France, the Paris Court of Appeal reached the same conclusion as the US court, confirming the position that it had adopted, and that the *Cour de Cassation* had affirmed, earlier in the *Hilmarton* case. As in *Hilmarton*, the court found that under Art. VII of the New York Convention, *Chromalloy* was entitled to rely on the narrower scope of grounds for refusal of recognition and enforcement under the French New Code of Civil Procedure.<sup>31</sup>

22. Pierre MAYER, “Revisiting *Hilmarton* and *Chromalloy*” in *International Arbitration and National Courts: The Never Ending Story*, ICCA Congress Series no. 10 (2000) p. 165 at p. 168.

23. *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F.Supp. 907 (D.D.C. 1996), also reported in *Yearbook XXII* (1997) p. 1001.

24. Art. VII(1) of the New York Convention provides in relevant part:

“The provisions of the present Convention shall not ... deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.”

25. 939 F. Supp. 907 (D.D.C. 1996) at pp. 909-910.

26. *Ibid.*, at p. 910.

27. *Ibid.*, at p. 914.

28. *Ibid.*, at p. 911.

29. *Ibid.*, at p. 913 (quoting *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614, 631 (1985)).

30. *Ibid.*, at 907 et seq.

31. *The Arab Republic of Egypt v. Chromalloy Aeroservices, Inc.*, *Cour d’Appel*, Paris (14 Jan. 1997), reported in *Yearbook XXII* (1997) p. 691 at p. 692-693.

Moreover, the court found that “the award rendered in Egypt was an international award which, by definition, is not integrated in the legal system of [Egypt]”, with the consequence that the court felt free to disregard the Egyptian annulment decision.<sup>32</sup>

Turning back to the United States, I should mention the *KBC v. Pertamina* case, where the United States District Court for the Southern District of Texas, in Houston, and the United States Court of Appeals for the Fifth Circuit recognized and enforced an arbitral award despite the fact that the award had been set aside in Indonesia,<sup>33</sup> which in that case was the country “under the laws of which” the award was made. Nonetheless, the Fifth Circuit vacated the Houston Court’s injunction of the Indonesian set-aside proceeding.<sup>34</sup> In so doing, the Fifth Circuit avoided addressing the issue of whether the Indonesian court was the proper forum for annulment under the New York Convention.<sup>35</sup> Instead, citing to the District of Columbia decision in *Chromalloy*,<sup>36</sup> the Fifth Circuit found that Art. VI of the New York Convention “grants the enforcement court discretion to enforce an award even though annulment proceedings may be taking place elsewhere”.<sup>37</sup> The Fifth Circuit’s observations highlight the court’s dilemma under the existing Convention:

“By allowing concurrent enforcement and annulment actions, as well as simultaneous enforcement actions in third countries, the Convention necessarily envisions multiple proceedings that address the same substantive challenges to an arbitral award.... In short, multiple judicial proceedings on the same legal issues are characteristic of the confirmation and enforcement of international arbitral awards under the Convention.

(....)

By its silence on the matter, the Convention does not restrict the grounds on which primary jurisdiction courts may annul an award, thereby leaving to a primary jurisdiction’s local law the decision whether to set aside an award. Consequently, even though courts of a primary jurisdiction may apply their own domestic law when evaluating an attempt to annul or set aside an arbitral award, courts in countries of secondary jurisdiction may refuse enforcement only on the limited grounds specified in Article V.”<sup>38</sup>

32. *Ibid.*, at p. 693.

33. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)*, 190 F.Supp.2d 936 (S.D. Tex. 2001), also reported in *Yearbook XXVII* (2002) p. 814. In the interest of full disclosure, I note that I acted for the Republic of Indonesia in that case and in related proceedings in other courts.

34. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)*, 335 F.3d 357, 360 (5th Cir. 2003), also reported in *Yearbook XXVIII* (2003) p. 908.

35. 335 F.3d at p. 366.

36. *Ibid.*, at p. 369, fn.52.

37. *Ibid.*, at p. 367, fn.42 (quoting Leonard V. QUIGLEY, “Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards”, 70 *Yale L.J.* (1961) p. 1049 at p. 1071 (“explaining that as a ‘reasonable complement to Article V(1)(e)’ Article VI is ‘wholly discretionary, and the enforcing State is free to refuse adjournment and to enforce the award, nullification proceedings in the rendering State notwithstanding’”).

38. 335 F.3d at pp. 367-368.

Albert Jan van den Berg's Draft goes a long way to protect against that, and I will address that below.

Other courts, including in France and the United States, have taken the opposite view, deciding not to enforce a vacated award.

It is interesting to note that in a decision preceding the *Norsolor*, *Hilmarton* and *Chromalloy* cases, the Paris Court of Appeal interpreted Art. V(1)(e) of the New York Convention as mandating refusal of enforcement and accordingly refused enforcement of a Swiss award, which the Swiss court had vacated as "arbitrary".<sup>39</sup> The later decisions of the Paris Court of Appeal and the French *Cour de Cassation* in *Hilmarton* and *Chromalloy* presumably have reduced the authoritative value of that decision.

Subsequent to *Chromalloy*, a number of US court decisions have distinguished that case and refused enforcement of awards set aside at the seat of the arbitration.

In *Baker Marine (Nig.) v. Chevron (Nig.)*, the United States Court of Appeals for the Second Circuit affirmed a decision of the United States District Court for the Northern District of New York denying petitions of Baker Marine to enforce two Nigerian awards, which had been set aside by a Nigerian court.<sup>40</sup> Relying on *Chromalloy*, Baker Marine argued that under Art. VII of the New York Convention it was nonetheless entitled to avail itself of the awards because US law (i.e., the law of the enforcement forum) did not recognize the grounds on which the Nigerian court had set aside the awards. The court rejected that argument on the grounds that the parties' arbitration agreement was governed by Nigerian law and made no reference to US law, and that Baker Marine had not asserted any violation by the Nigerian court of Nigerian law.<sup>41</sup> The court explained that,

"as a practical matter, mechanical application of domestic arbitral law to foreign awards under the Convention would seriously undermine finality and regularly produce conflicting judgments. If a party whose arbitration award has been vacated at the site of the award can automatically obtain enforcement of the awards [*sic*] under the domestic laws of other nations, a losing party will have every reason to pursue its adversary 'with enforcement actions from country to country until a court is found, if any, which grants the enforcement'."<sup>42</sup>

Baker Marine also argued that Art. V(1)(e) gave the court discretion not to enforce an award that had been set aside in its country of origin. The court rejected that argument finding that Baker Marine had not shown any "adequate reason for refusing to recognize the judgments of the Nigerian court".<sup>43</sup> In so doing, the court distinguished

39. *Clair v. Berardi*, Court of Appeal, Paris (20 June 1980), reported in *Yearbook* VII (1982) p. 319 at p. 321.

40. *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2nd Cir. 1999), also reported in *Yearbook* XXIV (1999) p. 909.

41. 191 F.3d at pp. 196-197.

42. *Ibid.*, at p. 197, fn.2 (quoting Albert Jan VAN DEN BERG, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981) p. 355).

43. *Ibid.*, at p. 197.

*Chromalloy* on its facts, pointing out that in *Chromalloy* the parties had expressly waived any appeal or other recourse against the arbitral award.<sup>44</sup>

Following *Baker Marine*, the United States District Court for the Southern District of New York, in *Spier v. Calzaturificio Tecnica*, for the same reasons refused to enforce an Italian award that had been set aside in Italy.<sup>45</sup>

More recently, in 2007, the United States Court of Appeals for the District of Columbia joined this trend to limit the effects of *Chromalloy*, in *TermoRio v. Electranta*.<sup>46</sup> The court expressly “subscribed to the reasoning of the Second Circuit in *Baker Marine*” and distinguished *Chromalloy* on its facts.<sup>47</sup>

Distinguished legal writers also have taken diametrically opposed positions on the issue as to whether an arbitral award that was vacated in its country of origin may be enforced elsewhere. Emmanuel Gaillard has taken the position that enforcement is permissible, emphasizing the “strength of the connecting factors between the dispute and each of the states involved”:

“The French conception of state review of awards rests on the idea that the state of the place of enforcement is as well positioned as the state of the seat to assess whether an award should be recognized and enforced.... The state of enforcement ... has a very real interest in ensuring that the award meets the standards of what it considers to be a decision worthy of public support. On a very basic level, between the state of the seat, which provides hotel rooms and conference centers for an arbitration, and the state of enforcement which permits the seizure and sale of assets in its territory, there can be little doubt but that the latter has the stronger interest in reviewing the award. This view is perfectly consistent with the New York Convention, which permits the state of enforcement to apply its own conception of public policy and its own standards concerning the arbitrability of the dispute in all cases. The fact that the state of the seat may also be the place or one of the places of enforcement of the award does not alter this analysis.”<sup>48</sup>

Based on a textual analysis, Jan Paulsson has taken the position that Art. V(1) of the New York Convention allows enforcement of an award set aside in its country of origin.<sup>49</sup> He also has advocated a differentiated approach under which the enforcement forum should give effect to an annulment in the country of origin only where the ground for annulment was included in the first four paragraphs of Art. V(1) of the New York Convention and Art. 36(1)(a) of the UNCITRAL Model Law and thus constituted an “international standard annulment”. Conversely, under this approach, the enforcement

44. *Ibid.*, at p. 197, fn.3.

45. *Spier v. Calzaturificio Tecnica, S.p.A.*, 71 F.Supp.2d 279 (S.D.N.Y. 1999).

46. *Termorio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007), also reported in *Yearbook XXXIII* (2008) p. 955.

47. 487 F.3d at pp. 935, 937.

48. Emmanuel GAILLARD, “The Enforcement of Awards Set Aside in the Country of Origin”, 14 *ICSID Rev. – FILJ* (1999) p. 16 at pp. 44-45 (referring to Art. V(2) of the New York Convention).

49. Jan PAULSSON, “*May or Must Under the New York Convention: An Exercise in Syntax and Linguistics*”, 14 *Arb. Int’l* (1998) p. 227.



forum should be free to disregard the annulment if it was based only on “local standards” (i.e., a “local standard annulment”, based on standards not included in the first four paragraphs of Art. V(1) of the New York Convention and Art. 36(1)(a) of the UNCITRAL Model Law).<sup>50</sup> In Jan Paulsson’s view, this approach would create “incentives for national courts to conform to internationally accepted standards”.<sup>51</sup>

Eminent writers also have expressed the contrary view. Thus, Michael Reisman stated:

“nullificatory consequences of decisions in primary jurisdictions have a universal effect. In terms of the dynamic of the convention, once an award has been set aside in a primary jurisdiction, it is not supposed to be enforceable anywhere else.

Once a venue or a governing law is selected, the convention gives to it a primacy with regard to the validity of the award. If an award is rendered, let us say, in Switzerland and is nullified under Swiss law, nothing should be enforceable in any other jurisdiction.”<sup>52</sup>

Albert Jan van den Berg similarly wrote: “If the arbitral award has been set aside in the country of origin, foreign courts are bound by that decision. In that case, they must refuse recognition and enforcement of the award”.<sup>53</sup>

The literature thus provides clear evidence of a significant conflict. As Pierre Mayer pointed out “when the award was set aside in the country of the seat, the lack of uniform reaction among the foreign countries can be disastrous”.<sup>54</sup> As a solution, he suggested drafting a new convention, additional to the New York Convention, that would enter into force only once a large number of States ratifies it.<sup>55</sup> With this, I turn now to Albert Jan van den Berg’s proposed revision of the New York Convention.

## II. ALBERT JAN VAN DEN BERG’S HYPOTHETICAL DRAFT CONVENTION

I think it is with elegant simplicity and clarity of language that Albert Jan van den Berg’s Draft gives us an approach that eliminates much of the textual ambiguity that gave rise to the litigation and the inconsistency of results discussed above.

(1) In its Art. 5(3)(g), using the word “shall” instead of “may”, the Draft makes clear,

“Enforcement of an arbitral award *shall* be refused if, at the request of the party against whom the award is invoked, that party asserts and proves that ... the award has been set aside by the court in the country where the award was made

50. Jan PAULSSON, “Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)”, *The International Court of Arbitration Bulletin* (1988, no. 1) p. 14 at p.29.

51. *Ibid.*, at p. 31.

52. W.M. REISMAN, *Systems of Control in International Adjudication and Arbitration* (1992) p. 114.

53. *Op. cit.*, fn. 1, pp. 41-42.

54. Pierre MAYER, *op. cit.*, fn. 22, at p. 172.

55. *Ibid.*, at p. 175.

on grounds substantially equivalent to grounds (a) to (e) of this paragraph.” (Emphasis added)

“Shall be refused” is a welcome clarification: It requires refusal of enforcement where the award has been set aside based on specified grounds ((a)-(e)); it strengthens primary jurisdiction; it avoids contradictory results; promotes greater harmonization of set-aside standards; and leads to greater predictability and less litigation in the post-award process.

(2) Referring to the country of origin of the award, the Draft no longer contains the two criteria of the present Convention’s Art. V(1)(e): the situs where the award was made or the situs of the law under which the award was made. Instead, Art. 5(3)(g) of the Draft focuses exclusively on the country “where the award was made”. Although, as Albert Jan van den Berg explains,<sup>56</sup> it is rare for parties to select an arbitration law other than the law of the place of arbitration, such cases do arise.<sup>57</sup> For those cases, the Draft provides a more predictable approach that also will be less prone to litigation.

(3) Art. 5(3)(g) of the Draft specifies that a set-aside in the country of origin must be respected elsewhere if it is premised “on grounds substantially equivalent to grounds (a) to (e) of this paragraph”. In contrast, Art. V(1)(e) of the existing Convention is silent with respect to the grounds for annulment. The Draft thus limits the grounds for setting aside an award to grounds “substantially equivalent” to those contained in the UNCITRAL Model Law in order for the set-aside to have universal effect<sup>58</sup> and permits discretion for domestic law grounds that go beyond. As Jan Paulsson has said,<sup>59</sup> this approach may increase harmonization of recognized set-aside grounds and reduce litigation.

(4) Turning to public policy: Under the New York Convention, Art. V(2)(b), the public policy exception, has been interpreted to include the domestic public policy of the forum, as we have seen in some of the cases discussed above. As mentioned, in the *Hilmarton* case, the English High Court found that “of course only . . . English public policy” (not international public policy) was relevant.<sup>60</sup> In the view of the High Court of Delhi, the court in *Cosid Inc. v. Steel Authority of India Ltd.*, the enforcing court was simply to apply the notions of public policy of the country of enforcement: “. . . the expression ‘public policy’ in . . . Art. V(2)(b) of the New York Convention refers to the *public policy of the country where enforcement is sought*, i.e., India”.<sup>61</sup> Similarly, the Hong Kong Court of Final Appeal found that “international public policy” referred not to “some standard common to all civilised nations” but rather to “those elements of a state’s own public

56. Explanatory Note at 23 (this volume, pp. 649-666).

57. See, e.g., *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)*, 335 F.3d 357, 363 (5th Cir. 2003), also reported in *Yearbook XXVIII* (2003) p. 908 (where the arbitration agreement provided for arbitration in Geneva and referenced Indonesian procedural law, the Indonesian court found that it had primary jurisdiction to annul an award made in Switzerland).

58. See Explanatory Note at 35-36 (this volume, pp. 654-655).

59. *Op cit.*, fn. 49, p. 31.

60. *Omnium de Traitement et de Valorisation S.A. v. Hilmarton*, High Court of Justice, Queen’s Bench Division (Commercial Court) (24 May 1999), reported in *Yearbook XXIV* (1999) p. 777, at p. 779.

61. *Cosid Inc. v. Steel Authority of India Ltd.*, High Court of Delhi (12 July 1985), reported in *Yearbook XI* (1986) p. 502 at p. 507 (emphasis added).

policy which are so fundamental to its notions of justice that its courts feel obliged to apply the same not only to purely internal matters but even to matters with a foreign element by which other states are affected”.<sup>62</sup>

This has been a source of great mischief in some jurisdictions and was in fact the subject of an International Law Association interim report which found, “Uncertainty and inconsistencies concerning the interpretation and application of public policy by State courts encourage the losing party to rely on public policy to resist, or at least delay, enforcement.”<sup>63</sup> As Audley Sheppard stated, “[p]ublic policy is often regarded as a vague concept which is impossible to define, which varies from State to State. This leads to uncertainty and unpredictability, which encourages the unsuccessful party in the arbitration to resist enforcement of the award on grounds of public policy.”<sup>64</sup>

Albert Jan van den Berg’s Draft Art. 5(3)(h) makes clear that the only predicate to denying enforcement is “international public policy prevailing in the country where enforcement is sought”.<sup>65</sup> The Draft thus clarifies that this exception is limited to international public policy, and thus promotes greater harmonization and predictability. By limiting the application of international public policy to the extent it *prevails* in the enforcement forum, Art. 5(3)(h) also defers to some extent to the enforcement forum’s laws, perhaps thereby making the transition more palatable to those countries that so far have applied exclusively domestic public policy.

### III. CONCLUSION

The Draft addresses many of the problems that we have encountered in interpreting the New York Convention over the past fifty years. An examination of the national courts’ decisions and scholarly writings fully supports the need for the change and simplification reflected in the Draft Convention. Although the effort required to amend the New York Convention will be great, if the Draft Convention is adopted, fifty years from now we will look back to conclude that it was worth the effort.

62. *Hebei Import and Export Corp. v. Polytek Engineering Co. Ltd.*, [1999] 1 HKLRD 665, 674, per Bokhary PJ, also reported in *Yearbook XXIV* (1999) p. 652.

63. International Law Association, “Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards”, London Conference (2000), in International Law Association, *Report of the Sixty-Ninth Conference* (2000) p. 340 at p. 374.

64. Audley SHEPPARD, “Public Policy and the Enforcement of Arbitral Awards: Should there be a Global Standard?”, 1 *Oil, Gas & Energy Law Intelligence* (March 2003, no. 2).

65. See “The Text of the Hypothetical Draft Convention”, this volume, pp. 667-669.