

THE 1958 NEW YORK CONVENTION FROM AN UNUSUAL PERSPECTIVE: MOVING FORWARD
BY PARTING WITH IT

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Abstract

The 1958 New York Convention has been described as one of the most successful treaties in the realm of international trade. It has been accepted by 157 States. The author discusses the lack of uniform application of the Convention and points to the flaws in its text. The author proposes an intellectual exercise of replacement of the Convention in order to answer pivotal questions such as: “Can this treaty be replaced” and “How should courts address current pitfalls such as public policy”. The author proposes a new Convention and aims to set out how this replacement would work and whether it is feasible or not.

I. Introduction: The Birth of a Champion among Treaties: The 1958 New York Convention

The U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards [the “**New York Convention**”] has existed since 1958. It did not spring into life out of nothing: it replaced the 1923 Geneva Protocol for the recognition of arbitration agreements and the 1927 Geneva Convention for the enforcement of arbitral awards.¹ In a post-WWI and a pre-WWII era, the Geneva Conventions were considered adequate. Post-WWII, the business community considered the Geneva Conventions to fall short. Why, is not exactly clear. The ICC representative, Haight, presented a new draft Convention with an explanatory note to the ECOSOC (Economic and Social Council, the predecessor to UNCITRAL) claiming that it was necessary to replace the 1927 Geneva Convention.² The result was stupendous: both the Geneva Conventions were replaced, even though an official mandate for replacing the 1923 Geneva Convention was lacking. The new Convention departed from the initial reason for replacing the Geneva Conventions by not only abolishing the double exequatur but creating an entirely new structure for enforcement embodied in Articles IV and V of the New York Convention – the burden of proof was shifted dramatically to the respondent, a presumption of enforceability was created in Article III and enforcement was to be speedy and easy on the basis of Article IV. The result of this bold renovation was unprecedented: to date, 157 States have acceded to the New

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¹ Protocol on Arbitration Clauses (Sept. 24, 1923), available at <http://www.newyorkconvention.org/other+relevant+conventions>; Convention on the Execution on Foreign Arbitral Awards (June 10, 1958), available at <http://www.newyorkconvention.org/other+relevant+conventions>.

² INTERNATIONAL CHAMBER OF COMMERCE [ICC], *Enforcement of International Arbitral Awards. Report and Preliminary Draft Convention* (ICC Publication No. 174, 1953), reprinted in ICC Ct. Bull. 32 (1998); Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Préparatoires - Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, at 32, U.N. DOC E/Conf.26/8/Rev.1 (1958). For this Proposal for a new Convention and Explanatory Note, see <http://www.newyorkconvention.org/travaux+preparatoires/history+1923+-+1958>.

York Convention and over 1800 decisions have been rendered world-wide under the treaty.³ It is considered a cornerstone of international law, a gem amongst treaties:⁴

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

An attempt to do away with the New York Convention was made by Professor Dr. Albert Jan van den Berg in 2008 at the occasion of the New York Convention's 50th Anniversary through the Miami Draft:

*After 50 years of its existence, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1959 is in need of modernization.*⁵

Van den Berg called the need for this new Convention because a number of provisions of the New York Convention 'needed to be added, to be revised' and yet another number of provisions were 'unclear, out-dated, and some needed to be aligned with prevailing judicial interpretation'.⁶ The international arbitration community did not follow suit. UNCITRAL did not adopt the Miami Draft as a basis for discussing a new treaty and the father of the New York Convention, Pieter Sanders, in an interview conducted by members of ICCA, pointed out that replacing the New York Convention would be impossible as the Contracting States would all have to accede to the new treaty, something which he considered to be impossible. Although the presentation of the Miami Draft did provide food for thought, it deterred all international legal scholars and practitioners since to propose change. Yet, for all its remarkable success, the New York Convention has proved itself to be (i) unreliable, (ii) unpredictable, and (iii) inconsistent because there is wiggle room in the New York Convention and occasionally its objectives seem to have very poor resonance.⁷

The first problem should be obvious: when the application of a treaty lies exclusively in the hands of national courts, its reliability will depend on domestic institutions of an uneven quality. The truth is that a significant number of States have become parties to the Convention, yet have omitted to take the most basic formal steps necessary to ensure that its commands are integrated into national law. The result is that the Treaty is a dead letter in their courts. The truth is also that courts in other States have interpreted the Convention in an arbitrary or chauvinistic fashion

³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (June 10, 1958), 330 U.N.T.S. 38, available at <http://www.newyorkconvention.org> [hereinafter "New York Convention"].

⁴ 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 (1999).

⁵ Albert Jan van den Berg, *Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards*, available at <http://www.newyorkconvention.org/draft+convention>.

⁶ *Id.*

⁷ MARIKE PAULSSON, *THE 1958 NEW YORK CONVENTION IN ACTION* xxii (2016).

without the least regard for consistency or reciprocity with practice elsewhere, thus frustrating the purposes of the Convention.⁸

However, would it even be possible to replace a treaty like the New York Convention when 157 States are party to it? Anno 2017, the status of the New York Convention is vastly different from the status of the Geneva Conventions in 1953. About fifty States had acceded to the Geneva Conventions. In 1955, about forty States were party to the 1923 Geneva Protocol on the Recognition of Arbitration Clauses and one would assume that the same States were a party to the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, although this is not clear from the drafting history.⁹ In 1958, 25 States signed on to the New York Convention.¹⁰ Within the next decade, about thirty more States acceded to the treaty and within 60 years that number rose to 157.¹¹ If the New York Convention were to be replaced, numerous hurdles are thrown its way: signing on to the new treaty, applicability of the New York Convention and the new treaty, transition provisions, more favourable right provisions, compatibility provisions: a complex array of treaty law that the interpreter must face. But the main reason for not wanting a new treaty is: it is impossible to replace the New York Convention. The current 157 Member States will not likely accept its replacement. Nor would the United Nations want to embark upon such an ambitious wish to improve the free flow of arbitral awards. But the exercise of contemplating a new treaty is worth it, just as the ICC representative Haight did in 1953, for it also enables us to understand the drafters' wish of 1958 and to finally reach a state of uniform application worldwide.

II. Before the Convention: the 1923 and 1927 Geneva Conventions

It seems impossible to perceive the idea of a pre-Convention era. Yet, there was one. The New York Convention replaced as said, the 1923 and the 1927 Geneva Conventions. They were regarded adequate until the post-WWII era:¹²

If the international community sees profit in peaceful commerce, it is less likely to disrupt it by fighting wars. So it was thought after the devastation of World War I. The ICC was created in its immediate aftermath. One of the first organs of the ICC was its International Court of Arbitration, so that the international arbitral process could be integrated into a system of compliance effective across borders. This notably took the form of two treaties which had self-explanatory titles: the Protocol on Arbitration Clauses of 1923 and the Convention on the Execution of Foreign Arbitral Awards of 1927, each concluded in Geneva. The same impulses came to the fore, one generation later, after the ravages of the World War II. Yet the world emerging from its ruins was remarkably different, notably due to the global phenomenon of decolonization. Relations among national systems were no longer the exclusive preserve of a handful of industrialized countries. The arbitral process to be effective, would have to insert itself into a far more numerous and complex array of national legal systems.

⁸ *Id.*

⁹ Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Préparatoires - Committee on the Enforcement of International Arbitral Awards. Protocol on Arbitration Clauses, Geneva, 24 September, 1923*, U.N. DOC E/AC.42/2 (1955).

¹⁰ See New York Convention, *supra* note 3.

¹¹ For status, see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

¹² See PAULSSON, *supra* note 7, at 3-4.

It was then, that the Geneva Conventions were considered out-dated and no longer fit for international modern trade.

Today, the New York Convention is considered inadequate to a certain extent because courts have developed a vast array of theories to interpret the New York Convention such that it fits their idea of sovereign notions of public policy, due process and local rules of procedure, to name a few reasons.

There are many complaints today about the outcome of the New York Convention in the national space. Users of arbitration, parties in international arbitration and actors in international trade opt for arbitration for the resolution of international disputes because it is preferable for many reasons to resolving a dispute in national courts.

Indeed, arbitration is still an adequate method for dispute resolution in international trade. Yet, there are criticisms by users such as the lack of transparency or the lack of impartiality. Some speak of the corruption in international arbitration and the existing bias in international arbitration. The criticism of international arbitration has extended to the outcome of the New York Convention. That outcome is diverse, pluri-form and, in many jurisdictions, the application of the New York Convention is unpredictable.

In that respect, there is criticism of the New York Convention just like there was criticism in 1953 of the Geneva Conventions. The difference: the Geneva Conventions only lasted thirty years before the New York Convention came into being. The New York Convention has been in existence for over sixty years. Only about fifty States were party to the Geneva Conventions as opposed to 157 parties to the New York Convention. The improvements made under the New York Convention vis-à-vis the Geneva Conventions contributed to the 1800 decisions rendered under the New York Convention: the abolishment of the double exequatur, Articles IV and V, the shifting of the burden of proof, the simplicity, improved overall structure of the New York Convention and Article VII.

Yet, why would it not be possible after sixty years of experience with enforcement of awards under the current treaty, to use those lessons learned for a better, even more improved and effective international instrument to enforce awards worldwide?¹³

Since the inception of the New York Convention, UNCITRAL has developed its Model Law and the 1961 European Convention on International Commercial Arbitration has also come into force.

There is competition:

In a 2014 speech delivered in Sydney entitled “Commercial Courts and International Arbitration – Competitors or Partners?”, Michael Hwang SC, referring to the New York Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention), described the Hague Convention on Choice of Court Agreements

¹³ See, e.g., Sapna Jhangiani & Rosehana Amin, *The Hague Convention on Choice of Court Agreements: A Rival to the New York Convention and a ‘Game-Changer for International Disputes’*, KLUWER ARB. BLOG (Sept. 23, 2016), available at <http://kluwarbitrationblog.com/2016/09/23/the-hague-convention-on-choice-of-court-agreements-a-rival-to-the-new-york-convention-and-a-game-changer-for-international-disputes/>.

(Hague Convention') as "a sort of mini version of the New York Convention for the enforcement of court judgments". Similarly, in a 2015 speech delivered in Dubai at the signing of memoranda between the courts of the Dubai International Financial Centre and the Singapore Supreme Court and entitled "International Commercial Courts: Towards a Transnational System of Dispute Resolution", Chief Justice Sundaresh Menon of Singapore described the Hague Convention as a "game-changer in the international enforceability of court judgments", which "aims to do for court judgments what the New York Convention has done for arbitral awards". Singapore signed and ratified the Hague Convention earlier this year (the ratification took place on 2 June 2016).¹⁴

Furthermore, numerous national arbitration laws have developed that are more favourable than the New York Convention, particularly with respect to Article II(2) – the 'in writing' requirement. For instance, the Dutch Arbitration Act, article 1021 of the Dutch Code of Civil Procedure, provides that the arbitration agreement shall be proven by an instrument in writing. The 'in writing' requirement is only a matter of evidence. Then, there are other regional conventions relied upon for the enforcement of awards such as the 1975 Panama Convention (the Inter-American Convention on International Commercial Arbitration) and the 1983 Riyadh Arab Agreement for Judicial Cooperation.

In a way, the mere fact that 157 States have acceded to the New York Convention could also really just be a number, just as the age of the New York Convention might just be a number. Out of the 1800 reported decisions, over 800 are rendered in the United States and thus the New York Convention is especially important in the United States whereas its impact is much less significant in other countries such as Saudi Arabia, Ecuador, Thailand or Uruguay where either no or only a few cases are reported, if one is to go by the official sources such as the Yearbook of the International Council for Commercial Arbitration.¹⁵ The United States offers controversial decisions such as the *PEMEX* decision (as will be discussed below). Therefore, the question remains how successful has the New York Convention really been over the last sixty years in the international space?

III. Addressing Current Waves of Criticisms on the Outcome of the New York Convention

The New York Convention has 157 Member States but it is predominantly applied by national courts in the West with an occasional decision coming from other regions such as the Middle East, with only three reported decisions from UAE.¹⁶

One of the most remarkable decisions that was subject to criticism in the recent history of the New York Convention is *Comissa v. PEMEX*.¹⁷ An award rendered in Mexico and set aside there, *Comissa*, on the basis of a law that was applied retroactively, was granted enforcement by Judge Hellerstein in New York and his decision was subsequently confirmed by the Court of Appeal

¹⁴ *Id.*

¹⁵ For a status of reported cases in the 157 Contracting States, see <http://www.newyorkconvention.org/other+relevant+conventions>.

¹⁶ Over 800 reported decisions are US decisions, see <http://www.newyorkconvention.org/court+decisions/decisions+per+country>.

¹⁷ See *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Production*, XXXVIII Y.B. Comm. Arb. (2013), N.E. 537-541 (First Instance decision by Judge Hellerstein); *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Production*, N.E. 13-4022 (decision by the Court of Appeal for the Second Circuit).

for the Second Circuit as there “exists an unfettered discretion to enforce annulled awards if the annulment violates the US notions of public policy and is repugnant to the most fundamental principles of morality and justice”.¹⁸ The decision has sparked a debate as to how far courts can go when deciding to declare awards enforceable even when another court, the court of the seat, had set aside the award.

Questions of international comity, the role of the courts and public policy under Article V(1) of the New York Convention become relevant again after sixty years of its inception.

Those problems of the outcome in the national space of the New York Convention must be addressed: the issue of enforcing an award that was set aside, the public policy gloss over Article V(1)(e) to disregard annulment decisions as they would be repugnant to what is fair and just in the country where enforcement is sought. With the challenging issue of enforcement of annulled awards as happened in *PEMEX* as mentioned above, the national setting aside regimes must be addressed: should national setting aside regimes be abolished?¹⁹ The author’s tentative answer is yes, national setting aside regimes should be abolished.

IV. The Russian Doll Effect and the Abolishing of Setting Aside Regimes

The author summarizes the issues as the Russian-doll effect.²⁰ The parties have to go through many layers of arbitral and judicial adjudication before knowing whether the resolution of a dispute leads to enforcement of an award or not. The layers are:

- Arbitration with a possible pre-arbitration jurisdiction phase that can be played out both in court and in front of an arbitral tribunal;
- Award;
- Possible arbitral appeal;
- Setting aside request by the losing party against the award;
- Appeal in two instances against the decision by a lower court on the setting aside request;
- In case of setting aside: enforcement request of the annulled award on the basis of theories developed after the birth of the New York Convention; and
- Appeal in two instances against a possible positive enforcement decision despite annulment.

The judicial adjudication of both setting aside and enforcement are based on similar grounds and the setting aside grounds are sometimes recycled in the enforcement procedure as well. The difference is that with setting aside, the court of the seat will assess the grounds and will be versed in the *lex arbitri* whereas for enforcement, the court is not versed in the *lex arbitri* and will only be able to test its own public policy grounds under Article V(2)(b).

These layers do not have a positive impact on the length of the entire procedure either. The time it would take to get from the filing of the request for arbitration to the ultimate decision by the highest enforcement court could counter the supposed advantage of arbitration: speed.

¹⁸ See Marika Paulsson, *Comissa v. PEMEX the Sequel: Are the Floodgates opened? The Russian Doll Effect further defined*, KLUWER ARB. BLOG (Aug. 11, 2016) available at <http://kluwerarbitrationblog.com/2016/08/11/reserved-pemex-decision/>.

¹⁹ Albert Jan van den Berg, *Should the setting aside of the Arbitral Award be Abolished?*, 29(2) ICSID Rev. 1, 1-26 (2014).

²⁰ Paulsson, *supra* note 18.

V. **A new Dual Convention: the Seat for Recognition Convention (Primary Convention I) and the Forum for Enforcement Convention (Secondary Convention II)**

A. What Could be Improved?

First of all, the New York Convention has no preamble or list of definitions. Most treaties do have a list of definitions and a preamble. It helps the interpreter understand the purpose of the treaty and the rationale behind the treaty. At the Conference in the summer of 1958 at the U.N. Headquarters where delegates assembled to create the New York Convention, Mr. Kaiser, the delegate from Pakistan, pointed out that although the text was an improvement compared to the Geneva Convention, the current draft did not contain any list of definitions of the most important key terms and phrases such as arbitral awards, for instance.²¹ Some delegates fought vehemently in favour of clarifying and defining important terms as not defining certain terms or phrases would surely be “*the joy of jurists, but might be a torment to plaintiffs [...] and the main purposes of the Conference was to draw up a New York Convention that was clear, unequivocal and easy to put into practice*”.²² What is never clear is whether the delegates suffered drafting fatigue, whether those with important proposals lacked persuasion or diplomacy skills, or whether the delegates preferred to agree to disagree. But, here too, the matter was put to rest by “*recognizing the divergence of views which had become apparent regarding the field of application of the Convention and that it would be better to choose a criterion which was adaptable to the different systems and for countries to trust one another for the enforcement of foreign awards.*”²³

The other treaty element that is lacking, the Preamble, is often used to understand the purpose of a treaty, as a starting point.²⁴ The New York Convention has no such Preamble nor does it have a provision setting out its purpose. The purpose can be found in the Final Act:

*The [New York] Convention on the recognition and enforcement of foreign arbitral awards just concluded would contribute to increasing the effectiveness of arbitration in the settlement of private law disputes.*²⁵

However, the Final Act, and particularly paragraph 14 of that Final Act (as quoted above), are known to few and thus courts have developed their own understanding of the New York Convention’s purpose: a ‘pro-enforcement bias’.²⁶

One of the other issues that cannot be resolved under the current text of the New York Convention is the scope. Many have assumed that the New York Convention does not only relate to the enforcement requests, for the court to grant the enforcement, a title, exequatur: Some also think it pertains to the subsequent execution of the award. With that, not only factors of immunity of jurisdiction, but also factors of immunity of execution come into play. Unfortunately, the text of the Convention does not make this clear.

²¹ Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Préparatoires - Summary Record of the 16th Meeting, 12 September, 1958*, at 9, U.N. DOC E/Conf.26/SR.6 (1958), comments of Mr. Kaiser (Pakistan).

²² Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Préparatoires - Summary Record of the 16th Meeting, 12 September, 1958*, at 10 U.N. DOC E/Conf.26/SR.6 (1958), comments of Mr. Cohn (Israel).

²³ Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Préparatoires - Summary Record of the 16th Meeting, 12 September, 1958*, at 12 U.N. DOC E/Conf.26/SR.6 (1958), comments of Mr. Herment (Belgium).

²⁴ RICHARD K. GARDINER, *TREATY INTERPRETATION* 196 (2008).

²⁵ PAULSSON, *supra* note 7, at 13.

²⁶ *Id.* at 14-15.

Article II(2) of the New York Convention stipulates that the agreement must be in writing and provides that for the purposes of this treaty that requirement is fulfilled if the agreement was signed by the parties or if there had been an exchange of letters or telegrams. The latter raised practical difficulties rather soon as the telefax emerged and, in today's world, one communicates electronically. A good faith interpretation leads all courts to accept modern means of communication. A good faith interpretation does not suffice, however, to align the stringent uniform rule for an agreement in writing with the current customs in international trade though—many agreements are concluded through tacit acceptance and conduct, something which is reflected in many national arbitration rules. UNCITRAL attempted to remedy the interpretation issues under Article II by providing the UNCITRAL Recommendations for Article II.²⁷ The status of those recommendations as to how they may be used to interpret a treaty is not clear if one is to seek guidance from Articles 31-33 of the Vienna Convention on the Law of Treaties, which provide the rules for treaty interpretation.

The issues with enforcement of annulled awards were discussed above which puts to question Article V(1)(e) providing that a court may refuse to enforce an award if the award had been set aside by the court of the country in which the award was rendered. The layers and Russian Doll effect have put to question Article V(1)(e) and also Article V(1) in general: Would it be for courts of enforcement to assess the enforceability of an award when most of the refusal grounds are engrained in the *lex arbitri* not the *lex fori*?

B. The First Practical Steps Towards a New Dual Convention

First, as in 1953, a draft Convention with Explanatory Note should be submitted to the successor of ECOSOC (the Economic and Social Council): UNCITRAL. The 1953 Draft was prepared by the ICC. The 2017 Draft can be prepared again by the ICC or by ICCA (the International Council for Commercial Arbitration), the organization that has taken a lead in the promotion of the harmonization of the application of the New York Convention worldwide with its Guide, Roadshows and Virtual Forum.²⁸ UNCITRAL or ICCA or the IBA could accept a Draft Dual Convention with Explanatory Note and constitute a working group to work with this draft and prepare a first draft for discussion by State delegates.

²⁷ United Nations, *Treaty Series*, Vol. 330, No. 4739, *Annex II. Recommendations regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 61-62, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session, A/6/17.

²⁸ In 2012, ICCA launched a series of colloquia for judges on the New York Convention known as the “New York Convention Roadshow”. This initiative recognized the dependence of international arbitration practice on the critical role of national court judges in applying the New York Convention. With over 150 contracting States and about 1900 national court decisions reported in ICCA's Yearbook Commercial Arbitration, the Convention is rightly regarded as the backbone of international commercial arbitration. Judicial workshops on the New York Convention are led by the ICCA Judicial Committee and organised with the assistance of Young ICCA. Each event is adapted to take account of the specific challenges faced by judges in applying the Convention in a particular region or jurisdiction, and includes both an article-by-article review of the Convention, as well as extensive dialogue with judges. Workshops make use of ICCA's “Guide to the Interpretation of the 1958 New York Convention” (now available in Burmese, Chinese, English, Farsi, French, Georgian, Greek, Italian, Polish, Portuguese, Spanish, Serbian, Russian and Vietnamese, complimentary copies of which are provided to participating judges) and of the New York Convention website”, see INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, *New York Convention Roadshow*, available at http://www.arbitration-icca.org/NY_Convention_Roadshow.html.

As ECOSOC accepted the 1953 ICC Draft and created a working group to prepare a draft that was to be the working draft for a new treaty for the recognition and enforcement of foreign arbitral awards to replace the 1927 Geneva Convention, a draft should be presented to UNCITRAL. The resolution of ECOSOC established a committee and that resolution read as follows:²⁹

The Economic and Social Council taking note of the draft convention [...] submitted by the International Chamber of Commerce;

Establishes an Ad Hoc Committee composed of representatives of eight Member States, to be designated by the President of the Council;

Invites each of the Governments represented in the Ad Hoc Committee to designate as its representative a person having special qualifications in that field;

Instructs the Ad Hoc Committee to study the matter raised by the International Chamber of Commerce in the light of all the relevant considerations and to report its conclusions to the Council submitting such proposals as it deems appropriate, including if it sees fit, a draft convention.

UNCITRAL would have to accept the need of discussion of a new draft and on that premise establish a committee consisting of representatives of a critical number of States enabling governments to identify delegates to review and amend drafts which would lead to a new United Nations convention. It was and is essential to identify the right delegates:³⁰

Ambassador Schurmann, as the elected chairman of the conference, had to shoulder the Herculean task, after five years of preparation, of presenting for signature a Convention within three weeks by orchestrating some 50 delegations, most of them diplomats accredited to the United Nations like himself and not particularly conversant in matters of arbitration on the one side and a very small group of highly sophisticated experts of arbitration on the other. He was at his best when he had to curtail delegates' rhetoric, which he did often, but gently, as if he were conferring a decoration.

It is important to remember that the first moment of discontent voiced by the business community was in 1951. It was not until 1953 that the ICC proposed a new draft to ECOSOC. The draft for discussion by the U.N. was not ready until 1955 and it took another three years of working groups meeting for sessions until the actual three week-Conference in June 1958 after which the Convention was concluded with its Final Act.³¹ Thus, it took eight years to replace the Geneva Conventions.

Having considered the general aspects of the question, the Committee concluded that it would be desirable to establish a new convention which while going further than the Geneva Convention in facilitating the enforcement of

²⁹ Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Préparatoires - Report of the Committee on the Enforcement of International Arbitral Awards*, U.N. DOC E/2704 and E/AC.42/4/Rev.1 (1955).

³⁰ Ottoarndt Glossner, *From New York (1958) to Geneva (1961) - A Veteran's Diary*, in ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE AND PROSPECTS 5 (1999).

³¹ Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Préparatoires - Final Act and Text of the Convention on the Enforcement of International Arbitral Awards*, U.N. DOC E Conf.26/8/Rev.1 (1958). For an overview of the history and the chronological overview of the creation of the New York Convention, see <http://www.newyorkconvention.org/travaux+preparatoires/history+1923+-+1958>.

*foreign arbitral awards, would at the same time maintain generally recognized principles of justice and respect the sovereign rights of States.*³²

After a new treaty is concluded, it would enter into force by instruments of deposit of ratification, acceptance or approval on the basis of Article 16 of the Vienna Convention on the Law of Treaties.³³

An extra provision could be added along the lines of Article VII of the New York Convention to make sure all matters of compatibility, retroactivity and more favourable rights are accounted for.

On the basis of Article 28 of the Vienna Convention on the Law of Treaties, a treaty does not apply retroactively unless a provision in the treaty expressly provides for retroactive application of the treaty. The New York Convention does not contain a provision on retroactive application. The new convention for good measure should have such a provision as the New York Convention did leave a gap as to which awards would fall under its scope and which would not.

Article VII(2) of the New York Convention provides that the Geneva Convention would cease to have effect between parties who became bound to the New York Convention. A similar provision could be added to the new Convention for parties who have acceded to the new Convention. However, it will be for a working group and a group of delegates representing a critical number of States to decide whether the new Convention should replace the New York Convention altogether or whether the Conventions could co-exist, in which case a compatibility provision similar to Article VII(1) should be added to the new Convention.

In case no specific provisions are added to the new Convention, with respect to the applicability of the New York Convention and the new Convention, Article 30 of the Vienna Convention on the Law of Treaties could be considered, which provides that:

(2) When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of the other treaty prevail.

(3) When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

If the new Convention is more favourable, why not allow parties to sign on to it and to rely on it either on the basis of Article VII of the New York Convention, the rules of the Vienna Convention on the Law of Treaties or a new compatibility provision of the new Dual Convention.

At first perhaps, only ten countries would sign the Dual Convention for the Recognition and Enforcement of Arbitral Awards and Agreements. This means that for those countries, the current New York Convention will apply, along with any regional conventions and the Dual Convention. This might seem cumbersome and it might take a decade or two for 160 States to

³² Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Préparatoires - Report of the Committee on the Enforcement of International Arbitral Awards*, ¶ 14, U.N. DOC E/2704 and E/AC.42/4/Rev.1 (1955).

³³ For the entry into force of treaties, *see also* Vienna Convention on the Law of Treaties, art. 3.

sign on to the Dual Convention but with a roadshow explaining the advantage of the new Convention, this process could be accelerated along with electronic means of communicating and disseminating the idea of a new convention. For those countries having acceded to both the Dual Convention and the New York Convention: the ‘more favorable right’ provisions under both the conventions can help them in obtaining the best outcome.

C. The Dual Convention: The Core Provisions of the Primary and Secondary Convention and an Explanatory Note

*	1958 New York Convention	Dual Convention I Primary	Dual Convention II Secondary
		Preamble	
		List of Definitions	
Article I	Scope: foreign and non-domestic arbitral awards	Scope: foreign, domestic, non-domestic and a-national arbitral awards and agreements	
Article II	Written form requirement: signature by the parties or exchange of letters or telegrams	Written form requirement: signature by the parties or exchange of any current form of communication, or the agreement shall have been concluded through conduct, tacit acceptance or any other means of concluding arbitration agreement as is customary in modern trade	
Article III	Awards are binding and shall be enforced according to the forum’s rules of procedure and no more onerous conditions shall be imposed.	Awards are presumed to be binding and shall be granted recognition and enforcement on the basis of the forum’s rules of procedure and on the basis of good faith.	
Article IV	The party requesting enforcement shall submit the agreement, award and translation, authenticated and certified.	The court of the country where the award was rendered shall determine <i>prima facie</i> whether the applicant has submitted a valid arbitration agreement and binding award.	The party requesting enforcement shall submit the award, agreement, translation and recognition judgment of the country where the award was rendered. The

*	1958 New York Convention	Dual Convention I Primary	Dual Convention II Secondary
			burden of proof is <i>prima facie</i> only.
Article V(1)	The court may refuse to enforce in cases of: a. Lack of arbitration agreement; b. Violation of due process; c. Violation of mandate; d. Violation of composition arbitral procedure; e. Award is not binding, was suspended or set aside.	The burden of proof rests on the party resisting enforcement and is heavy. Further, the canons of Article V(1) will apply. ³⁴ A court may only refuse to enforce in cases of: a. Lack of valid arbitration agreement; b. Violation of due process; c. Violation of mandate; d. Violation of composition procedure; e. Award is not binding or was suspended.	-
Article V(2)	Enforcement may be refused if the award was not arbitrable or violates public policy on the basis of the laws of the country where enforcement is sought.	-	Enforcement may be refused if that would violate the forum's most fundamental principles of morality and justice.
Article VI	The enforcement decision may be stayed if a setting aside procedure is pending.	-	-
Article VII(1)	'More Favourable Right' clause and Compatibility clause	'More Favourable Right' clause and Compatibility clause	'More Favourable Right' clause and Compatibility clause
Article VII(2)	Non-retroactivity clause w.r.t. Geneva Convention	Retroactivity clause with respect to New York Convention	Retroactivity clause with respect to the New York Convention
Article VIII	This Convention shall be open to U.N. Member States	This Convention shall be open to all States	This Convention shall be open to all States

* Instead of quoting the full text of the provisions, the essence is summarized here and only the changes are reflected here.

³⁴ See PAULSSON, *supra* note 7, at 165-175.

Making both treaties applicable would not be a new phenomenon for the enforcement of foreign and non-domestic arbitral awards. The New York Convention's Article VII enables courts to apply the New York Convention or a more favourable law or provision.³⁵ It also contains a compatibility provision such that some treaties can co-exist. Consider the 1961 European Convention on International Commercial Arbitration to which over thirty States are a party. The European Convention was not one made under the leadership of ECOSOC (or its successor UNCITRAL). It was made under the auspices of the Committee on the Development of Trade of the Economic Commission for Europe of the United Nations.³⁶ Although this is a U.N. treaty not an E.U. treaty, the aim was to promote the development of European trade.³⁷ The European Convention is only open for signature or accession by countries members of the Economic Commission for Europe.³⁸ The 1961 European Convention too has a compatibility provision in Article X(7).³⁹

The new Dual Convention would do away with national setting aside regimes and leave the assessment under the *lex arbitri* to the courts of the seat, the courts versed in the *lex arbitri*.⁴⁰

The new convention would consist of the Primary and Secondary Convention. The Primary Convention grants the successful party the right to seek a recognition title in the country where the award was rendered. That request will be submitted to the court of the country where the award was rendered. That court will not have to decide on any setting aside request instead. The only way for a respondent to resist the enforcement of the award is by resisting the enforcement on the basis of Article V(1). The court will assess whether there had been a violation of due process under the laws of the seat (*lex arbitri*), whether there was a valid arbitration agreement, whether the mandate was complied with, whether the procedure was in accordance with the arbitration agreement or *lex arbitri*, and whether the award is binding on the basis of the *lex arbitri*. The improvement is that multiple courts of other countries are not asked to assess these factors under the *lex arbitri*, a law that they are not familiar with, and the court of the seat can no longer invoke local public policy to set aside the award or stop enforcement of the award. The only local notions to stop enforcement are those based on the *lex arbitri*, which is a law that was chosen by the parties and is based on party autonomy. The latter is a pillar of international

³⁵ New York Convention, art. VII(a) ("The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States or 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").

³⁶ European Convention on International Commercial Arbitration, Apr. 21, 1961, available at https://treaties.un.org/doc/Treaties/1964/01/19640107%2002-01%20AM/Ch_XXII_02p.pdf (see the Final Act for a full text of the 1961 European Text and Resolution adopting the text).

³⁷ *Id.*

³⁸ *Id.*

³⁹ Article X(7) provides that 'the provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning arbitration entered into by Contracting States'.

⁴⁰ It goes beyond the scope of this article to analyse Article I(1) and V(1)(e) referring to the seat to which the parties had agreed or the law to which the parties had agreed, which creates an assumption that the two could be different. The rule of thumb is that the law of the seat will be the *lex arbitri*. However, at the Conference a different scenario was discussed in which the law of the seat and the *lex arbitri* are different ones. This was then translated into the text of the Convention. For a detailed analysis, see Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Préparatoires - Summary Record of the 16th Meeting, 12 September, 1958*, at 8, U.N. DOC E/Conf.26/SR.6 (1958), comments of Mr. Bulow (Federal Republic of Germany).

arbitration and of the New York Convention. The multiple layers are removed as there is no setting aside to stop enforcement, only an enforcement or recognition procedure exists in the country of the seat.

The Secondary Convention would be applied in all the countries where enforcement is sought, i.e. where the successful party has found assets to execute the award. Those courts would no longer make use of Article V(1) as availability of Article V(1) has been restricted to the country of the seat. Those courts can only rely on Article V(2): methods to stop enforcement based on the public policy of the country where enforcement is sought.

The Dual Convention would have a pro-enforcement gloss because the successful party can request the enforcement title/stamp in the country where the award was rendered with the respondent only being able to resist on the basis of Article V(1). The route of setting aside the award no longer exists. The successful party can then take that enforcement title to 156 other Contracting States and the only hurdle to face would be public policy under Article V(2). Therefore, this structure is unlike the double exequatur that existed under the 1927 Geneva Convention.

The international instrument replacing the New York Convention would consist of two Conventions that would operate in tandem, like communicating vessels. First, there would be a primary convention that would be applicable in the country where the award was rendered. Second, there would be a secondary convention that would be applicable in the countries where enforcement is sought; the U.N. Convention on the Recognition of Awards and Agreements at the Seat (I) and the U.N. Convention on the Enforcement of Foreign Awards and Agreements at the Forum (II) will be the system followed. Together they are to be called the U.N. Conventions on the Recognition and Enforcement of Awards and Agreements, I and II.

D. Public Policy: Article V(2) in the Forum where Enforcement is Sought

Public policy has been a stopper to enforcement: Countries where enforcement is sought can hold that the award and the enforcement thereof would violate public policy. In the 1927 Geneva Convention, the following provisions incorporated notions of public policy of the country where enforcement was sought: Article 1(b), providing that the party requesting the recognition and enforcement of foreign arbitral awards would have to prove that the subject matter of the award is arbitrable. The New York Convention was certainly an improvement as, under Article IV, the successful party requesting enforcement would only have to submit the agreement, award and translation. Article 1(e) of the Geneva Convention provided that it “*shall be further necessary that the award is not contrary to the public policy or the principles of the law of the country in which is sought to be relied upon*”. The Geneva Convention’s text remains ambiguous as to what the burden of proof would be and thus easily allows courts to place it on the successful party. This too was improved under the New York Convention’s Article V(2).

Article V(2) was inserted to protect the sovereign notions of public policy of the country where enforcement was sought. Although the New York Convention was aimed at facilitating speedy and easy enforcement across the globe and although it instructs Contracting States to consider the award as binding, States would not sign on to this treaty if they could not safeguard their own sovereignty found in public policy. Their courts should be able to stop the enforcement of

an award if granting that enforcement request would violate the State's most fundamental notions of morality and justice. Later during the Conference, the delegates agreed that only United Nations Member States could become a party to the Convention, as not all countries adhere to the same idea of public policy.⁴¹ It is only fair that States can stop enforcement of foreign awards if the same would be repugnant to their notions of what is moral and just. What is moral and just can vary from country to country. What unites Member States to the New York Convention is that they are all United Nations Member States and thus they abide by norms and values embodied in the various United Nations treaties. The delegates in 1958 disagreed as to whether or not to include a provision that would allow all States to accede to the Convention. Today, it makes more sense to have such provision.

There is no objection to the enforcement forum continuing to apply Article V(2), as that provision relates to the *lex fori*, the law of the country where the enforcement is sought: public policy and arbitrability of the country where enforcement is sought can lead to refusal of the enforcement of the award. However, the outcome under Article V(2) would improve if the wording reflects the dominant judicial application: public policy means 'fundamental norms of morality and justice'.

E. The Perceived Impossibility of Replacing the New York Convention

The late professor Pieter Sanders, who has been called by many the father of the New York Convention, was consulted about replacing the New York Convention with the Miami Draft.⁴² He gave one very practical and important reason for why, in 2008, it would have been impossible to replace the New York Convention: Many Contracting States would not become a party to the new convention. Persuading UNCITRAL and the United Nations to create a working group to present a draft text to the U.N. delegates as a basis for drafting a new treaty would be a highly ambitious and challenging endeavour. Having the delegates agree to one text that would be better from a legal perspective than the text of the New York Convention, would most likely not happen. What would happen is that a first draft of a text for a new treaty might be close to perfect, the final text that delegates would be able to adopt would most likely also be 'an agreement to disagree'. The text of the New York Convention "*naturally reflects compromises as the delegates departed from ideal phrasings as they negotiated less coherent formulations*".⁴³ Even if the delegates would be able to adopt a final text, the question would remain – will all Contracting States to the New York Convention sign on or later accede to a new Convention? This was a valid question asked in 2008. In 2016, with 157 Contracting States, the question is even more relevant. However, complacency does not lead to progress and proper enforcement of the rule of law. It does not safeguard international arbitration as a means of conflict resolution in international

⁴¹ See PAULSSON, *supra* note 7, at 35-36; Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Préparatoires - Summary Record of the Fourth Meeting*, at 5, U.N. DOC E/Conf/26/SR.4 (Sept. 12, 1958), comments of Mr. Pscolka (Czechoslovakia).

⁴² See New York Convention, *supra* note 3; for the text of the Miami Draft and the Explanatory Note by Albert Jan van den Berg, see <http://www.newyorkconvention.org/draft+convention>; for a commentary on the Miami Draft see also Marike Paulsson, *The Miami Draft: the good twin of the NYC*, KLUWER ARB. BLOG (Oct. 7, 2010) available at <http://kluwerarbitrationblog.com/2010/10/07/the-miami-draft-the-good-twin-of-the-nyc/>.

⁴³ See PAULSSON, *supra* note 7, at 6; Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Préparatoires - Summary Record of the Third Meeting*, at 2, U.N. DOC E/Conf/26/SR.3 (Sept. 12, 1958), comments of Mr. Urabe (Japan).

trade. Only a critical lens will lead to progress. The exercise of contemplating a new convention to replace a treaty that is over sixty years old enables the actors in international law to think of improving the procedures for enforcement of awards worldwide.

F. A Hypothetical

Some hypothetical examples may aid the reader to understand how the Dual Convention would work, what its advantages would be and if it would be hard to implement in countries that have acceded to the New York Convention and whose laws include a setting aside regime. The hypotheticals also demonstrate how the mechanism of enforcement of awards can result in denial of justice. The exercise of thinking about a new Convention and the exercise of testing hypotheticals to the effective outcome of that new Convention, demonstrates how the existing pillars of party autonomy and sovereignty might form an impediment to an effective outcome under the new Convention just as they do under the current New York Convention. But the exercise also shows how party autonomy and the pivotal choice of the seat affect arbitration and subsequent enforcement of award elsewhere. Sovereignty is one of the pillars that resurface under the new Dual Convention as well. Lastly, if the Secondary Convention is limited to Article V(2), how do we delineate the definitions of public policy in each State other than referring to fundamental norms for morality and justice? It all creates food for thought.

i. Turkmenistan v. Foreign Party

Let us say that Turkmenistan has entered into a contract with a foreign party X to construct hotels. Further, let us assume that this dispute, the arbitration and subsequent enforcement is not a matter of investment arbitration under a BIT or enforcement under the ICSID Convention. This concerns two parties entering into a contract with an arbitration clause that provides for international commercial arbitration where one of the parties happens to be a State.

ii. Lack of valid arbitration agreement

Turkmenistan begins an arbitration in Turkmenistan. For some reason, Turkmenistan was acceptable as a seat even though one of the parties is the State. A subsequent award is rendered in favour of Turkmenistan. However, the question was whether there was, in fact, a valid arbitration agreement. For the sake of this intellectual and hypothetical exercise, let us assume that there was no valid arbitration agreement. Therefore, in an ideal world, the courts of Turkmenistan would have decided as follows: They would have applied the Primary Convention I, which contains Article V(1). Turkmenistan, having signed on to the Dual Convention, has adapted its national laws and abolished its national setting aside regime. The only provision left to contest the award is Article V(1). Whether there is a valid arbitration agreement would be assessed on the basis of the *lex arbitri* according to Article V(1)(a). On the basis of Article V(1)(a), the court would then decide in favour of the party contesting the award that the award is not enforceable for lack of a valid arbitration agreement. Apart from any possible appeal against the enforcement decision, based on the local rules of procedure, the battle ends there. Any other court of enforcement will have to respect the court of the seat's decision under the Primary Convention. Any other country where the enforcement is requested, will only be able to address any objections against enforcement on the basis of the Secondary Convention, Article V(2), which is limited to notions of public policy.

The advantage of this structure is that the layer of setting aside is removed from the contestation phase and only the court of the seat will address the questions under Article V(1), which are predominantly based on the *lex arbitri*. Questions of validity of the arbitration agreement will only be answered by the court of the seat rather than having multiple enforcement courts decide whether there was a valid arbitration agreement on the basis of a law with which they are not familiar. This one-stop process then leads to an approval or rejection of the award by one court of one jurisdiction which must be respected by other States. The only exception thereto is public policy of the country where enforcement is sought: Article V(2). The successful party has more hopes for a proper assessment under Article V(1) by the courts of origin as they are versed in the *lex arbitri* and it is the forum chosen by parties. The Dual Convention is based on party autonomy, one of the main pillars of international arbitration. Article V(2) cannot be eliminated altogether as it encompasses another important pillar of the current New York Convention, one that States would never surrender: sovereignty.

Let us go back to this hypothetical and assume that the world has not rid itself of denial of justice and let us assume that courts sometimes are biased towards their nationals and that some courts are not independent from their government. So instead of the courts of Turkmenistan rendering a decision on the basis of the *lex arbitri*, which should have led to the outcome that there was no valid arbitration agreement, the courts would (perhaps subconsciously) render in favour of their State and hold that there is a valid arbitration agreement. Let us establish in this hypothetical situation that this is indeed a denial of justice by refusing to hold that there is no valid arbitration agreement. What happens next is that Turkmenistan holds in its hand an award that has received the stamp of approval of its courts under the Primary Convention. All the respondent can do is to resist enforcement under Article V(2): public policy. Article V(2) was not to be understood as broadly as to encompass all the grounds of Article V(1). Would the lack of a valid arbitration agreement fall under the enforcement State's narrow and international definition of public policy? Such a result is unlikely. Could an enforcement court then state that it cannot enforce the award, because it cannot recognize the recognition judgment of the courts of Turkmenistan since the recognition judgment is repugnant to its most basic and fundamental norms of morality and justice? This would be a suitable way to counter denial of justice in the country of the seat. However, it would also mirror the *PEMEX* scenario, which enabled a US court to review the annulment judgment of the Mexican court and hold that the Mexican court's adjudication was flawed. That too is an indirect appeal and that too creates a pathway to other courts delving into matters of law and adjudication of other courts. That too leads to defying international comity. When can other courts of enforcement hold the courts of the seat accountable for denial of justice? The question is similar to when enforcement courts can hold courts of the seat accountable for denial of justice with respect to an annulment decision. The answer lies, as always, in the burden of proof.⁴⁴

⁴⁴ See PAULSSON, *supra* note 7, at 212 (“A fifth approach would be to focus on the evidence that must be submitted under Article V(1) in general rather than on the public policy outcomes under Article V(1)(e) in particular: the drafters expressed the importance of the enforcement court being satisfied with the evidence submitted by the respondent: only if the heavy burden of proof was met, should the court consider to refuse the enforcement”).

iii. Valid Arbitration Agreement

Let us take this hypothetical again and give it yet another twist for the purposes of understanding this intellectual exercise of designing a new Convention.

Turkmenistan loses the arbitration and there was a valid arbitration agreement. In this scenario, Turkmenistan would contest the validity of the award under the Primary Convention with the use of Article V(1): lack of a valid arbitration agreement. We must accept for hypothetical purposes that there was a valid arbitration agreement. The court, however, aiding Turkmenistan, holds that the award cannot be recognized and is not enforceable because of lack of a valid arbitration agreement. The way the Dual Convention would work is that enforcement elsewhere would no longer be possible as the court of the seat has held that this award cannot be enforced. On the basis of evidence, the denial of justice is apparent and the unfairness of courts acting in a manner that is not independent will lead courts of enforcement to look for a way out. The only core provision left under the Secondary Convention is Article V(2) which enables a court to stop enforcement because of violation of public policy, and not to allow for enforcement. This exercise is similar to the situation where an annulment of an award is clearly a denial of justice. For example, in case of an award rendered against a State or State owned entity, the court of the seat will want to protect that entity or the State by disposing of the award. Courts around the globe have found ways to enforce the annulled award nonetheless. As the Secondary Convention would still have an article similar to Article IV, requesting the submission of the award and the agreement, and under the Secondary Convention, also the judgment of the court of the seat that the award was recognized, and for the respondent to only be able to rebut this by submitting a judgment that the award was held not to be enforceable, the court of enforcement could hold that it will disregard the evidence submitted by respondent, *i.e.*, the judgment under the Primary Convention, holding that the award was not enforceable. The issue with this solution is that again, courts of enforcement disregard judgments by the courts of the seat. Also, once again, it is a violation of international comity. Just as one must be very cautious with the enforcement of annulled awards, one must be very cautious with the enforcement of an award that was held unenforceable at the seat. The question is again whether the judgment under the Primary Convention should have territorial effect only or not. Under the premise of the Dual Conventions, the judgment of the courts of the seat should have extra-territorial effect just as many agree that setting aside judgments have extra-territorial effect.

The only silver lining is here – responsibility of the parties. Parties had both agreed to Turkmenistan as the seat of the arbitration even though Turkmenistan was a party to the arbitration and the risk of its courts being protective or not independent was bound to be present. Parties must pay attention when choosing the seat as the consequences could be disastrous and, in many instances, one could not resort to courts of enforcement to remedy any lack of independence of the courts of the seat. With the current knowledge of the outcome of international arbitration, whether in the realm of commercial or investment arbitration, one knows which countries have been successfully accused of denial of justice. If one enters into an agreement with a State or State-owned entity and one contemplates an arbitration clause, one does well to remember whether that State is known for its acts of denial of justice. One would make an effort to negotiate a clause that provides for a neutral seat – to prevent is better than to cure, especially if there might not be a cure available.

VI. Conclusion: a Bold Proposal?

Professor Pieter Sanders' role in drafting the New York Convention was the writing of a new draft in the summer of 1958 that became the text of the New York Convention:

The Dutch Proposal was perhaps a wolf in sheep's clothes in not only preserving the Conference's mandate and realizing its aim of facilitating enforcement, it was also "bold" because it was more progressive than the ICC Draft, which had perhaps been a sheep in wolf's clothes. Its "clarification" was not only to eliminate the so-called double exequatur; the Dutch Proposal contained the seed of what became Articles IV and V.⁴⁵

At the time, many of the New York Convention's innovations were considered quite bold. It was considered to be bold to eliminate the double exequatur and to shift the burden of proof or to denationalize arbitration more and more. So, why would it not be bold now to introduce a new system that is better suited and tailored after the current international infrastructure, incorporating sixty years of lessons learned? Reflection upon a possible new system for enforcement might seem difficult, if not impossible, but a dialogue to such extent is pivotal for progress.

It is true that one must find ways to limit the powers of the courts of enforcement with respect to Article V(2) – public policy. The risk is that courts may enlarge the reach of Article V(2) to stop the enforcement of awards under the guise of public policy. However, the decisions rendered under Article V(2) of the New York Convention demonstrate a dominant judicial application using a narrow scope of Article V(2) – only a narrow, international version of public policy would be used to stop the enforcement of an award.⁴⁶

To be certain of proper use of the public policy exception, recommendations could be drafted by UNCITRAL or one could make use of the recommendations of the International Law Association.⁴⁷

Public policy is a way for States to protect their sovereign rights and there is little international actors can do to circumvent this sovereign right which is considered to be fundamental by States:

The real problem about an international court of arbitration was, and still is, that it would be a creature of independent sovereign states, and independent sovereign States act too often like billiard balls which collide, and do not co-operate.⁴⁸

The other issue, as highlighted with the use of hypotheticals, is the possibility of denial of justice. This is not something new. The current New York Convention has revealed its shortcomings in situations where an award was wrongfully set aside and foreign courts refused enforcement

⁴⁵ *Id.* at 19.

⁴⁶ *Parsons & Whittemore Overseas Co. Inc. v. Societe Generale de l'Industrie du Paper (RAKTA)*, Bank of America (2nd Cir. 1974), 1 Y.B. Comm. Arb. 205 (1976).

⁴⁷ International Law Association, New Delhi Conference (2002), Committee on International Commercial Arbitration chaired by Professor Pierre Mayer, recommendation 1b) ("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").

⁴⁸ Fali Nariman, 3rd Session of the Judicial Dialogue on the New York Convention: Introduction to the New York Convention: the Convention and Sovereignty (Nov. 23, 2013) available at http://www.arbitration-icca.org/media/2/13916005409590/nyc_roadshow_speech_23rd_nov_nariman.pdf.

under Article V(1)(e), but also in situations where perhaps the setting aside was proper and yet a court of enforcement, refusing to invoke Article V(1)(e), and allowed the enforcement of the set aside award. If an award is proper but has been set aside, that can sometimes lead to denial of justice. If an award is not enforced, it can lead to denial of justice under a BIT. The current New York Convention has not always proven adequate to confront these issues. The valid question remains whether a new Convention could.

At the practical level, and as discussed above, there are many hurdles. The United Nations would have to accept the idea of creating a new Convention. All 157 States would ultimately have to accede to the new Convention. Contracting States would not only have to ensure to implement the Convention and make it part of their national laws, they would have to amend their national laws by abolishing settings aside regimes which might also mean that national laws based on the UNCITRAL Model Law would have to be changed.⁴⁹

Therefore, in reality, a Dual Convention on the Recognition and Enforcement of Foreign Arbitral Awards consisting of a Primary and Secondary Convention might not ever happen just as the Miami Draft remained a hypothetical exercise only. Why then think about a new Convention? Because it raises awareness with respect to the fact that although the New York Convention operates in 157 States, its outcome is not uniform, but is rather very fragmented – with judges having vast powers to interpret its text in various ways – leading to uncertainty as to how a court in any of the 157 States would render a decision on an enforcement request. The Dual Convention Draft would create a platform to address the current issues that have surfaced under the New York Convention. This dialogue might lead to UNCITRAL creating a working group to craft further recommendations for the enforcement of awards worldwide as was done for Article II(2) and Article VII. It might also lead to the ICC establishing a Special Task Force with users of international arbitration to address the outcomes under *PEMEX* and other cases that have caused controversy so as to address the users' criticism of the current mechanisms in place to enforce awards across the globe. It might lead to establishment of a regional Convention as was the case with the European Convention of 1961. At the very least, it will lead to a dialogue for the future of the recognition and enforcement of awards and arbitration agreements across borders.

⁴⁹ The UNCITRAL Model Law provides for a national setting aside regime in Article 34. Section 2(a) of the Article is similar to Article V(1)(a-d) and therefore mostly based on the parties' agreement and the *lex arbitri*. The second part, however, section 2(b) mirrors Article V(2) and with that the UNCITRAL Model Law allows for the courts of the seat to set aside the award on the basis of local public policy, something which has caused other courts to wonder whether they should recognize such an annulment judgement. The European Convention's Article IX, on the other hand, is an improvement as it allows enforcement courts to disregard annulments that were based on the public policy of the seat. See http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.