

A New York Convention for the Next Fifty Years

Albert Jan van den Berg

Miami Beach, October 31, 2009

Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards - 2008

<http://www.newyorkconvention.org>

Hypothetical Draft Convention 2008

Article 1 – Field of Application

1. This Convention applies to the enforcement of an arbitration agreement if:
 - (a) the parties to the arbitration agreement have, at the time of the conclusion of that agreement, their place of business or residence in different States, or
 - (b) the subject matter of the arbitration agreement relates to more than one State.
2. This Convention applies also to the enforcement of an arbitral award based on an arbitration agreement referred to in paragraph 1.
3. Where this Convention refers to the enforcement of an arbitral award, it comprises the recognition of an arbitral award.

Hypothetical Draft Convention 2008

Article 2 – Enforcement of Arbitration Agreement

1. If a dispute is brought before a court of a Contracting State which the parties have agreed to submit to arbitration, the court shall, at the request of a party, refer the dispute to arbitration, subject to the conditions set forth in this article.
2. The court shall not refer the dispute to arbitration if the party against whom the arbitration agreement is invoked asserts and proves that:
 - a) the other party has requested the referral subsequent to the submission of its first statement on the substance of the dispute in the court proceedings; or
 - b) there is *prima facie* no valid arbitration agreement under the law of the country where the award will be made; or
 - c) arbitration of the dispute would violate international public policy as prevailing in the country where the agreement is invoked.
3. The court may on its own motion refuse to refer the dispute to arbitration on ground (c) mentioned in paragraph 2.

Annex II

Recommendation 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, 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

The United Nations Commission on International Trade Law,

Recalling General Assembly resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

Conscious of the fact that the different legal, social and economic systems of the world, together with different levels of development, are represented in the Commission,

Recalling successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,

Uncitral Recommendations

Convinced that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958,¹ has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

Recalling that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference “considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes”,

Bearing in mind differing interpretations of the form requirements under the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

Taking into account article VII, paragraph 1, of the Convention, a purpose of which is to enable the enforcement of foreign arbitral awards to the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention,

Considering the wide use of electronic commerce,

¹ United Nations, *Treaty Series*, vol. 330, No. 4739.

Uncitral Recommendations

A/6/17

Taking into account international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration,² as subsequently revised, particularly with respect to article 7,³ the UNCITRAL Model Law on Electronic Commerce,⁴ the UNCITRAL Model Law on Electronic Signatures⁵ and the United Nations Convention on the Use of Electronic Communications in International Contracts,⁶

Taking into account also enactments of domestic legislation, as well as case law, more favourable than the Convention in respect of form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,

Considering that, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,

1. *Recommends* that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive;

2. *Recommends also* that article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

Hypothetical Draft Convention 2008

Article 3 – Enforcement of Award - General

1. An arbitral award shall be enforced exclusively on the basis of the conditions set forth in this Convention.
2. The law of the country where enforcement is sought shall govern the procedure for enforcement of the award.
3. There shall not be imposed onerous requirements on the procedure for enforcement nor substantial fees or charges.
4. Courts shall act expeditiously on a request for enforcement of an arbitral award.

Hypothetical Draft Convention 2008

Article 4 – Request for Enforcement

1. Fulfillment of the conditions set forth in this article entitles the party seeking enforcement to be granted enforcement of the arbitral award, unless the court finds that a ground for refusal is present under the conditions set forth in articles 5 and 6.
2. The party seeking enforcement shall supply to the court the original of the arbitral award.
3. Instead of an original of the arbitral award, the party seeking enforcement may submit a copy certified as conforming to the original. The certification shall be in such form as directed by the court.
4. If the arbitral award is not in an official language of the court before which enforcement is sought, the party seeking enforcement shall, at the request of the other party or the court, submit a translation. The translation shall be in such form as directed by the court.

Hypothetical Draft Convention 2008

Article 5 – Grounds for Refusal of Enforcement

1. Enforcement of an arbitral award shall not be refused on any ground other than the grounds expressly set forth in this article.
2. Enforcement shall be refused on the grounds set forth in this article in manifest cases only.
3. 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:
 - (a) there is no valid arbitration agreement under the law of the country where the award was made; or
 - (b) the party against whom the award is invoked was not treated with equality or was not given a reasonable opportunity of presenting its case; or
 - (c) the relief granted in the award is more than, or different from, the relief sought in the arbitration and such relief cannot be severed from the relief sought and granted; or

Hypothetical Draft Convention 2008

Article 5 – Grounds for Refusal of Enforcement (Cont'd)

- (d) the composition of the arbitral tribunal was not in accordance with the agreement of the parties, or in the absence of such an agreement, not in accordance with the law of the country where the award was made; or
- (e) the arbitral procedure was not in accordance with the agreement of the parties, or in the absence of such an agreement, not in accordance with the law of the country where the award was made; or
- (f) the award is subject to appeal on the merits before an arbitral appeal tribunal or a court in the country where the award was made; or
- (g) the award has been set aside by the court in the country where the award was made on grounds equivalent to grounds (a) to (e) of this paragraph; or
- (h) enforcement of the award would violate international public policy as prevailing in the country where enforcement is sought.

Hypothetical Draft Convention 2008

Article 5 – Grounds for Refusal of Enforcement (Cont'd)

4. The court may on its own motion refuse enforcement of an arbitral award on ground (h) of paragraph 3.
5. The party against whom the award is invoked cannot rely on grounds (a) to (e) of paragraph 3 if that party has not raised them in the arbitration without undue delay after the moment when the existence of the ground became known to that party.

Hypothetical Draft Convention 2008

Article 6 – Action for Setting Aside Pending in Country of Origin

1. If the application for setting aside the award referred to in article 5(3)(g) is pending in the country where the award was made, the court before which the enforcement of the award is sought under this Convention has the discretion to adjourn the decision on the enforcement.
2. When deciding on the adjournment, the court may, at the request of a party, require suitable security from the party seeking enforcement or the party against whom the award is invoked.

Hypothetical Draft Convention 2008

Article 7 – More-Favourable-Right

If an arbitration agreement or arbitral award can be enforced on a legal basis other than this Convention in the country where the agreement or award is invoked, a party seeking enforcement is allowed to rely on such basis.

Hypothetical Draft Convention 2008

Article 8 – General Clauses

The General Clauses to be considered and possibly included in the Draft Convention include amongst others:

- a) Designation of Competent Enforcement Court
- b) Interpretation
- c) Relationship with the New York Convention
- d) References to the New York Convention in other treaties
- e) Compatibility with other treaties
- f) [No]reservations
- g) General reciprocity (see also § 21 above)
- h) Applicability of the Draft Convention to territories and in federal states
- i) Signature, ratification and accession, and deposit
- j) Entry into force
- k) Retroactive [in]applicability; transitional clauses
- l) Denunciation
- m) Notifications
- n) Language of authentic texts

T.M.C. ASSER INSTITUTE - THE HAGUE

The New York Arbitration Convention
of 1958

Albert Jan van den Berg

KLUWER LAW AND TAXATION PUBLISHERS

**For More on the Next
Fifty Years:**

<http://www.newyorkconvention.org>