

60 YEARS OF THE NEW YORK CONVENTION – A REWIND TO FAST-FORWARD

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Professor (Dr.) Albert Jan van den Berg, founding partner at Hanotiau & van den Berg spoke at the third annual White & Case/Carolyn Lamm International Arbitration Lecture at Miami Law about “Reflections on the 60th Anniversary of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards”.

Having formerly taught at the University of Miami, Prof. van den Berg was warmly welcomed back by the administration and students. Dean Patricia White inaugurated the lecture by acknowledging the pivotal role played by Prof. Carolyn Lamm, an alumnus of the University of Miami, in endowing and supporting the University with the “White & Case International Arbitration LL.M. Program”. Prof. Carolyn Lamm thanked Dean White and stated with conviction that the LL.M. Program and the International Arbitration Institute were geared towards mentoring the future practitioners of the field under the leadership of professors Jan and Marike Paulsson. Prof. Lamm observed that the Annual Lecture provided a platform for “scholarship, learning and thought leadership” and Prof. van den Berg was only idyllic as he “knows the history and has the vision”.

Prof. Marike Paulsson, Director of the International Arbitration Institute introduced Prof. van den Berg. She recalled his 1981 Ph.D. thesis and his more recent attempt for a new Convention vide the Miami Draft. She kick-started the lecture with the powerful words, “revisiting the Convention might not lead to replacement, but an attempt to do so is owed to the users of international arbitration” en reminded the audience of Fali Nariman’s statement “International law has perhaps not achieved much but it is good that it is there”.

The lecture commemorated the 60th Anniversary of the New York Convention and was a bitter-sweet appeal to the international arbitration community to acknowledge the success of the Convention whilst recognizing the many places where the text has derailed in practice. Prof. van den Berg synthesized two reasons for the effectiveness of the Convention being in danger – first, the scheme of the Convention no longer corresponds to the needs of the global community; and second, misguided judicial interpretation has precipitated the text beyond recognition. It would do good to remember that the Convention is a treaty and is therefore susceptible to Articles 31, 32 and 33 of the VCLT – courts should therefore be faithful to the text and not indulge in fanciful interpretation. A misguided interpretation of Article VII has led to an “anything goes” approach by courts. This has resulted in chaos in the enforcement of the Convention awards.

With this premise, Prof. van den Berg undertook a thorough article-by-article analysis and pointed to the numerous deficiencies and failings of the text. He also elaborated on how these shortcomings were fixed in the Miami Draft Convention of 2008 which he visualized through the lens of a participating delegate.

The cracks are visible from the outset - Article I which chalks out the field of application is unnecessarily complex, Prof. van den Berg noted. Upon undertaking a reverse-assembly line-analysis, it was observed that the Convention applied to an award made in another state or a non-domestic award. A non-domestic award is further one where the award is made in the enforcing state under the laws of another state or because the arbitration contains a foreign element. While

the first is an academic indulgence that does not find prevalence in practice; the second is a creation of U.S. courts. The complexities of subsequent overlapping annulment and enforcement procedures that closely shadow an imprecise scope was presented in a tabular format.

The next fissure analyzed was that posed by Article II (2). In its current language, the Convention does not cover the modern parlance of tacit acceptance. This is, he said, “the biggest stumbling block under the Convention”. Although the United Nations tried to make amends with the 2006 Recommendations, the document is filled with what Prof. van den Berg calls “UN-ese”. The first operative clause of the Recommendations iterates that the requirements under Article II are not exhaustive due to the language “shall include”. While the Recommendations might have been an enthusiastic endeavor, it nonetheless does not consider the corresponding French and Spanish versions of the Convention which use the word “means” as opposed to “shall include”. UNCITRAL seems to have referred to the English text alone and read the language to be non-exhaustive. However, such a reading would not only be opposed to drafting history but also to the canons of interpretation under the VCLT, advised Prof. van den Berg.

The second part of the lecture focused on judicial attitudes as obstacles. Prof. van den Berg pointed that the New York Convention was drafted with a scheme to balance the rights and obligations between petitioners and respondents. Courts have prominently relied on the “may” in Article V and the more-favorable-right in Article VII to indulge in fanciful interpretations and distorted the intended balance.

Article V is configured around a simple question of proof. Upon a meticulous comparison of the jargon used in the English, French, Spanish, Chinese and Russian versions of the Convention, Prof. van den Berg urged that discretionary power should not be assumed. The multilinguistic exercise resounded the VCLT and found comfort with the diverse student body.

Further, he added, the European Convention which ripened in the hands of nearly the same drafters of the New York Convention clears the fog over the depth of discretion granted. Prof. van den Berg’s Draft Convention of 2008 takes inspiration from there.

With the New York Convention aimed at facilitating enforcement of arbitral awards, Article VII on its part merely provides that if prevailing domestic law or other treaties makes enforcement easier, the more favorable regime can be relied upon. Nevertheless, that regime and the NYC are “mutually exclusive” and parties cannot cherry-pick across systems.

With these arguments being the front-runners for the urgency of amendment, the quandaries posed by Article III and IV were also briefly discussed. In conclusion, Prof. van den Berg urged that an amendment is the only viable solution. UNICTRAL endorsed guidelines are not sufficient and it is time for the community to take solid steps toward progress. Recognizing that critics might remark that there is no political will, he confessed that he is an optimist – it took 25 years to replace the Geneva treaties, maybe we needed 60 years to amend the New York Convention.

The lecture was followed by a Q & A session which touched on a range of issues.

One of the attendees was Andrey Kondakov, Director of the Russian Federation's International Center for Legal Protection, an institution he described as created to defend Russia's interest in, amongst others, the famous Yukos case. He intervened to underline the importance of the New York Convention. "It may have to be updated, maybe upgraded, but for us it is very important and works perfectly." He referred to Russia's position in the context of the Yukos case as that of "a victim of international arbitration but a beneficiary of the Convention", i.e. able to stave off the enforcement of a very large award by using the defenses available under the Convention to argue the non-applicability of the Energy Charter Treaty (the instrument under which the Yukos arbitration was based) inasmuch as the "oligarchs" behind the case were Russians "disguised as foreign investors through foreign shell companies" who had not made real investments, and although Russia had signed the ECT it never ratified it. "We smoked, but we never inhaled!" as he put it. He stressed that the Convention was an essential safeguard; "it's an important mechanism, and we are using it fully."

Professor Marike Paulsson reiterated - especially for an audience mainly consisting of academics and students - that there are many theories applied under Article V(1)(e) and that the one presented by Kondakov was the *ex nihilo nil fit* theory but that there are other theories endorsed under Article V(1)(e). She also pointed out that only one side in the *Russia v. Yukos* case was advocated here and that judges present in the room would agree with the importance of applying due process in any enforcement procedure.

The majority of the questions came, fortunately, from current and former students of Miami Law. When asked what he hoped to achieve from the Draft Convention considering realism, Prof. van den Berg feared aloud that a decade from now the New York Convention might be beyond recognition due to the behavior of courts. He hopes that his Draft Convention acts as a sort of guidance or interpretative note to prevent that and to create awareness.

When questioned about the absence of a dispute settlement clause in the Draft Convention, Prof. van den Berg observed that several provisions of the Draft Convention are yet to be written and a dispute settlement clause is one amongst them. Noting that the interpretation clause provided in the NAFTA has helped thwart many problems, he welcomed the idea of including one in the Draft Convention. Professor Marike Paulsson suggested a working group to be established at Miami Law to further study the Miami Draft and propose further text amendments that could ultimately lead to a draft similar to the Harvard Draft.

When a student wondered about what the future holds for local standards of annulment, Prof. van den Berg remarked that LSA's will persist and parties need to be careful while choosing the place of arbitration - "you get what you sign up for".

He supported yet expressed pessimism when questioned whether enforcing courts would adopt uniform procedure in relation to technicalities of litigation at the stage of enforcement (such as stamp duties, certification, etc.). However, he observed that the Draft Convention imposes an obligation on courts to "act expeditiously" on enforcement requests and this might help parties evade delays that come along with technicalities.

A final question was whether “international public policy” as used in the Draft Convention was detached from national historical and political aspects. Prof. van den Berg disagreed and stated that international public policy is a construct with foundations in national public policy.

Prof. Marike Paulsson thanked Prof. van den Berg and metaphorically compared his Draft Convention to the impossible dream of the Man of La Mancha. She reflected that from the time of Yukos v. Russia to Pemex, notions of sovereignty have collided like billiard balls and gone in opposite directions. Recognizing the efforts of ICCA in setting up communication lines with judges, Prof. Paulsson echoed Prof. van den Berg’s plea that something more needs to be done.

Prof. Paulsson symbolically compared modern day enforcement as a never ending Russian Doll of proceedings before numerous forums – all at the cost of predictability. The lecture ended on a pensive note with Prof. Paulsson quoting Fali Nariman - international law has perhaps not achieved much, but it is good that it is there.