

JUDICIAL APPLICATION OF THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

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When we look at the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, we must ask ourselves, who recognizes foreign arbitral awards and who enforces them. The answer is, of course, judges of national courts -- judges who have a variety of legal backgrounds and who work in different political, social, and economic systems. Just think of it, there is one Convention, but there are hundreds of judges of national courts scattered around the world who interpret it, without a single supreme court to assure that their decisions are consistent and form a coherent system. Yet, as one looks at the judicial decisions relating to the Convention, we find a remarkable degree of consistency. Were that not so, the Convention would be like the tower of babel in *The Bible*; a tower that would collapse because every court spoke in a different legal tongue and issued a different message.

I would emphasize that achieving consistency among national courts is not a matter of theoretical jurisprudence; it is a practical necessity in facilitating international trade. For a variety of reasons, business people choose arbitration to resolve disputes that might arise in their transactions. To conduct their business, they must be able to rely on the effectiveness of arbitral awards, and that is only possible when decisions of national courts are predictable. Judicial unpredictability breeds commercial uncertainty and uncertainty hampers the free flow of trade. Moreover, we must remember that the role of courts is particularly significant because international trade is one of the building blocks of world peace.

In this context, the United Nations Commission on International Trade Law ("UNCITRAL") convened a symposium at United Nations Headquarters in New York to celebrate the fortieth Anniversary of the Convention. The meeting was held on June 10, 1998, the exact anniversary of the day when the Convention had, forty years earlier, been opened for signature by states. During the Symposium, a panel of judges of national courts were asked to share their views on how to achieve predictability in judicial application of the Convention.

The U.N. planners of the program rightly considered it important that the speakers on the panel include judges from a variety of regions and legal cultures. The judges spoke in the alphabetical order of their names, rather

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than the alphabetical order of the countries, because each spoke in his or her personal capacity, not as a national representative. I will take a moment to describe each of these judges so that you will be able to appreciate the diversity and depth of experience of the panel members. They included:

Judge Mohamed Aboul Enien, who has been a member of the Egyptian judiciary for more than forty years and is presently Senior Vice President of the Supreme Constitutional Court of Egypt. He has also been a moving force in international commercial arbitration as the Director of the Cairo Center for Commercial Arbitration and as Secretary-General of the Union of Arab Arbitration Centers.

Justice Michael Goldie, who has been a Justice of Appeal of British Columbia in Canada, since 1991. You will recall that British Columbia was the first jurisdiction to enact the UNCITRAL Model Arbitration Law.

Judge Supradit Hutasingh, who joined the judiciary in Thailand in 1970 and became a Justice of the Supreme Court in 1994.

Judge Jon Newman, who was Chief Judge of the United States Court of Appeals for the Second Circuit from 1993 to 1997 and now serves as a Senior Judge on that court.

Judge Ana Isabel Piaggi, who brought to the panel the perspective of Latin America and the viewpoint of the civil law. In Argentina, she is a judge and an honorary President of the National Commercial Court of Appeals. She has been active in law reform in her country and has been a member of its delegation to UNCITRAL.

The Chairman was from the United States.

Each of the judges was asked to focus on the following questions:

1) When a national court is seized of a case concerning the Convention, is it useful and appropriate to look at decisions of courts in other countries? Are uniform interpretations of such terms as "agreement in writing" desirable? When enforcing awards, should courts apply international public policy rather than national public policy?

2) If a national court considers decisions of foreign courts relating to the Convention, what weight should the national court give to foreign decisions? For example, should foreign decisions be used for information or guidance only, or should greater weight be given in the interest of a public policy of promoting harmonization and predictability in order to facilitate international commerce?

All of the judges agreed that it is useful and appropriate to look at decisions of courts in other countries and to seek to promote uniformity in applying the Convention. A very useful comment was made by Judge Newman, which I would like to quote extensively because of the valuable insights that he contributed. Judge Newman said:

I think it unlikely that the courts of any jurisdiction will take the decisions of other jurisdictions as binding authority, even on matters where uniformity of interpretation of international

documents is highly desirable. Nevertheless, it should be expected that courts will look to the decisions of foreign jurisdictions interpreting such documents and take significant guidance from such decisions.

In assessing the force of such guidance, I think a distinction will often be appropriate depending on the number of times the interpretive issue has arisen. If, for example, there exists one, or even two, decisions of another jurisdiction construing a term or phrase of an international document a certain way, a court of the next jurisdiction to consider the matter might well feel free to make a different interpretation. Otherwise, the meaning of documents would depend on the fortuity of which jurisdiction was first to encounter the issue. The second jurisdiction might well provide a better reasoned basis for reaching its differing conclusion.

On the other hand, if a consistent interpretation has been reached by four or five jurisdictions, then a court of the next jurisdiction to face the issue should normally follow what has by then become the settled interpretation, unless some especially compelling aspect of domestic law, such as a conflict with internal public policy, requires otherwise. In the absence of such a special circumstance, it is more important that uniformity of interpretation be achieved as to the understanding and application of documents that govern international commercial transactions than that the court of any one jurisdiction reach its preferred interpretation.

Finally, the use of decisions from various jurisdictions in achieving more uniformity of interpretation will be significantly aided by timely dissemination of pertinent decisions and their availability through on-line services. Some of this now exists, but it needs to be made far more timely and more frequent.

Judge Newman's emphasis on the importance of wide dissemination of information concerning court decisions on the application of the Convention was also a topic of discussion by the panel. The judges were asked whether they thought it was desirable to encourage programs for further familiarizing national court judges with issues related to application and interpretation of the Convention. All answered "Yes." But when asked if there are programs in their respective countries to accomplish this, most responded that no such organized educational efforts exist. Moreover, the judges were asked whether they thought it would be useful to encourage such programs on an international level, and if so, would they favor having

such programs conducted by: i) international organizations of judges; ii) the UNCITRAL Secretariat; iii) international organizations for promoting arbitration, such as the International Council for Commercial Arbitration (ICCA); and iv) international bar associations? While the judges spoke favorably of the international organizations mentioned in the question, most seemed to feel that educational efforts would be most effective, and most economical, if conducted on a national level.

Sometimes lawyers hesitate to cite decisions of foreign courts to national judges. On the basis of the comments of the judges on the panel, my distinct impression was that courts considering issues relating to the New York Convention would be receptive to being informed how other courts have decided similar issues. In that connection, the cooperative project of UNCITRAL and the International Bar Association to collect and disseminate decisions relating to the Convention should be most useful.

Finally, I suggest that arbitral institutions and government agencies can play a useful role in assisting courts. For example, the American Arbitration Association has, over the years, helped mold United States arbitration law by acting as *amicus curiae* in key cases. My impression is that this has not been widely done elsewhere. Organizations such as UNCITRAL and the International Council for Commercial Arbitration (ICCA) might well promote that idea to arbitral institutions and Chambers of Commerce. To the same end, it might be useful to study the extent to which various national procedural systems permit government agencies to submit to their courts statements of interest or briefs supporting uniform application of the Convention for the purpose of promoting international commerce that is important to their countries.

Looking back on the panel discussion during New York Convention Day, I am encouraged that the bench and bar, working together with imagination and energy, could make major contributions toward applying the New York Convention to achieve effective arbitration worldwide, and by doing so can facilitate international commerce that is vital to each country and to world peace.