Is there a need to reform the New York Convention of 10 June 1958?

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The ideal starting point is that you don't fix what is not broken.

An English Law Lord once said, albeit extra judicially: *"... the New York Convention is both the Best Thing since sliced bread and also whatever was the Best Thing before sliced bread replaced it as the Best Thing..."*.[ii]

The adoration that the New York Convention ("NYC") has received, which primary object is to foster the establishment of robust trade and commercial interactions in the international sphere and dispute resolution through arbitration, is not without basis; as it boasts of an unprecedented number of independent State signatories.[iii] Apart from the founding treaties of the United Nations, the NYC is the most successful modern treaty measured by the number of its signatory States.

Like every human endeavor that is subject to limitation, the NYC is not an exception. Several academics, practitioners, and even jurists have sought to identify the deficiencies within the NYC, and there are several reasons why many have advocated for some form of reform of the NYC.

The first has to do with the language of the NYC and the fact that there is no authoritative *travaux préparatoires* that aids understanding. As we know, the NYC was drafted at the time when the United Nations had no specialist translator for arbitration.[iv] Hence, in translating the NYC into the five primary languages of the United Nations, there were noticeable differences in the end product across the various jurisdictions. For instance, the English and Russian versions of Article II (2) of the NYC defines an "agreement in writing" to "include" an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. By using the term "include" or its Russian version, widens that scope of an agreement in writing beyond the express wordings of the statute. However, the French and Spanish versions of the NYC do not make for such liberal interpretation as the word "include" or its equivalent was not used.[v] Resultantly, what constitutes an agreement to arbitrate depends on the jurisdiction where same is interpreted.

There are also issues with enforcement, primarily as it relates to issues contained in article V(2) (b) which provides that a contracting state may, on its own, refuse to recognize and enforce a foreign arbitral award where it finds that the subject of matter of the dispute is not arbitrable or such a recognition and enforcement is contrary to the laws of the State where the award is to be enforced. It is noteworthy that "Public Policy" was not defined by the NYC, and practical realities have shown that "Public Policy" is a very elusive concept to define.[vi] As they say, it is an unruly horse and in a bid to determine what public policy is and the arbitrability of a dispute in line with the domestic laws of a state, awards are often re-litigated. Indeed, this discretion imbues states and contracting parties with the power to invoke public policy as a pretext, not the main reason, not to enforce an arbitral award and may, in fact, defeat some of the key reasons why commercial entities go to arbitration.[vii]

Various authors have argued that the use of the term "may" in Article VI is rather ambiguous.[viii] The courts in some states have held the position that a competent authority in the jurisdiction where a foreign award is to be relied on has a discretion to enforce such an award even though same has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.[ix] A clear instance is *US COMMISA v. Pemex* [x], where the US Court of Appeal for the Second Circuit affirmed the decision of the lower court enforcing an award that was set aside in Mexico, the seat of the arbitration, on the pretext that the Mexican court's decision was "repugnant" to US public policy principles, and thus was not to be revered.[xi]

This said, is there really a real need for reform?

One starting point, is the UNCITRAL Model Law on International Commercial Arbitration of 1985, the read of such model shows that despite its modernity, provisions relating to the enforcement are almost the same, as those set forth in the NYC – and even the expansiveness of public policy remains.

Nevertheless, to avoid issues relating to language, some harmonization, could to be undertaken. Will this be in the form of a new NYC? The answer is probably in the negative as it is unclear whether so many of the current signatories will approve it. An approach which has been suggested[xii] is that the UN should seek to have a harmonious construction of national laws with respect to the NYC in order to rid the discretionary interpretation by different courts. One way to achieve this will be to start the publication of court decisions on the NYC. With the publication of court decisions in a harmonized bank (even if parties and facts are kept secret to assure confidentiality), such publications would reveal different interpretations, and spark debate that leads to harmonization.

The status of the NYC, as it is a short convention that gives powers to the jurisdiction of each state, is the reason why the NYC has gathered almost 80% of the countries, such result on international level is very hard to achieve and no other convention has made such success, so why risk this by making changes to simply make some clarifications or harmonization.

Therefore, in the meantime, and to borrow the words of Mr. V.V. Veeder QC, "…*even if the New York Convention were broke, which it isn't, the likely "cure" would be far worse than any imagined malady. It would turn a healthy workhorse into a lame old nag, if not actual cat-food…*"[xiii].

And so, to the question raised by this article, our answer is an EMPHATIC NO!

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[i] Africa Arbitration Academy 2019 session participants.

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[ii] V.V. Veeder QC, "Is there a need to revise the New York Convention", keynote speech, The review of International Arbitral Award, IAI Forum, Dijon12 – 14 September 2008,p. 186 , accessed at https://www.arbitration-icca.org/media/4/65649893142747/media012773755795520veeder_is_there_a_need_to_revise_the_new_york_convention_2010.pdf

[iii] The statistics have showed that the NYC has about 159 independents States signatories out of the 197 countries of the World. Which is to the effect that about 82% of the Countries in the world have ratified the Convention.

[iv] V.V. Veeder QC, "Is there a need to revise the New York Convention", keynote speech, The review of International Arbitral Award, IAI Forum, Dijon12 – 14 September 2008, p. 188.

[v] *Ibid.*

[vi] Albert Jan van den Berg (ed), "50 Years of the New York Convention", ICCA International Arbitration Conference, ICCA Congress Series, Volume 14 (Kluwer Law International 2009), pp. 649-666.

[vii] It has been variously argued that the gravest problem which is faced by the parties is the losing state's abusive resistance to enforcement of an arbitral award. This issue rises from the state's ability to invoke its immunity from execution to resist enforcement. See V.V. Veeder QC, "Is there a need to revise the New York Convention", keynote speech, The review of International Arbitral Award, IAI Forum, Dijon12 – 14 September 2008, p.190-191.
See also Alvaro Cracia Martinez, " Is there a need to reform the New York Convention of 10 June 1958?", the winning essay of 2018 laureate of Paris Arbitration Academy prize, available at https://arbitrationacademy.org/wp-content/uploads/2018/07/27.pdf.

[viii] *Ibid.*

[ix] See Articles VI and V (1)(e) of the New York Convention, 1958.

[x] Corporación Mexicana de Matenimiento Integral, S De RL De CV v. Pemex-Exploración y Producción, No 13-4022 (2d Cir Aug 2, 2016), (decided under the Inter-American Convention on International Commercial Arbitration ("Panama Convention") modeled on the New York Convention.

[xi] Some other perceived deficiencies of the NYC include the fact that the use of the phrase "duly authenticated original award" in Article IV(1)(a) is anachronistic and absurd in practice. Also, the terms "suspended award" in article V(1)(e) and "any interested party" in article VII (1) was not defined in the NYC. This could lead to absurdities in interpretation.

[xii] Alvaro Cracia Martinez, "Is there a need to reform the New York Convention of 10 June 1958?", the winning essay of 2018 laureate of Paris Arbitration Academy Prize.

[xiii] V.V. Veeder QC, "Is there a need to revise the New York Convention", keynote speech, The review of International Arbitral Award, IAI Forum, Dijon12 – 14 September 2008, p. 194.