11 December 2024
UNCITRAL WG II
Original: English

Interpreting the New York Convention in line with Dispute Resolution in the Digital Economy

Proposal Submitted by the Kingdom of Bahrain

I. BACKGROUND

1. At its fifty-seventh session, the Commission mandated Working Group II to work on the recognition and enforcement of electronic arbitral awards and, subsequently, on electronic notices of arbitration. The Commission provided the Working Group with a broad mandate to identify issues and explore them without prejudice. At the Commission's request, the Secretariat organized a two-day colloquium during the eightieth session of the Working Group where this topic was considered

2. The UNCITRAL Colloquium consisted of four panels. The first discussed issues related to electronic awards from the perspectives of arbitral institutions. The second discussed the experience of digitalization in national court proceedings, focusing on the electronic rendering and enforcement of judgments. The third provided an overview of existing UNCITRAL texts on electronic commerce and electronic communication. The fourth panel focused on the consistency across UNCITRAL instruments and capitalizing on the solutions they provide. The Colloquium concluded with a roundtable discussion.

3. In that context and for the purposes of the roundtable, the Kingdom of Bahrain's delegate, Professor Marike Paulsson, presented an analysis of the scope of The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

II. WORKING PAPER

4. The goal of this paper is to stimulate informed consideration of the ways and means to ensure recognition and enforcement of electronic arbitral awards under the New York Convention, and thus to foster confidence in the international arbitral process by adapting it to advances in modern technology.

A. Premises

5. The New York Convention is recognized as the single most important instrument in the development of international commercial arbitration. The New York Convention "perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law."[1] It is essential that it be interpreted to accommodate technological advances so as to secure the objectives of international commerce.

6. It is crucial to ensure uniformity and predictability in the interpretation and application of the New York Convention while (A) integrating subsequent international instruments, notably the 1985 UNCITRAL Model Law on International Commercial Arbitration, as subsequently revised in 2006, the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures and the United Nations Convention on the Use of Electronic Communications in International Contracts and (B) being attentive to domestic legislation and case law more favorable than the New York Convention in respect of form requirement.

[1] Michael Mustill, Arbitration: History and Background, 6 J. Intl. Arb. 43 (1989), as cited in Marike R. P. Paulsson, The 1958 New York Convention in Action (Kluwer Law International, 2016), p. xxi.

B. Recommendations for interpreting the 1958 New York Convention with respect to the validity of arbitral agreements, proceedings, and awards.

1. The term "arbitral awards" in Article I of the New York Convention includes arbitral awards rendered in electronic form or any other form aligned with modern commercial usages, provided that it permits ascertainment of the parties' intent and consistently therewith achieves finality and enforceability.

2. The requirements in Article IV(1)(a) of the New York Convention to provide a "duly certified copy" of the arbitral award is satisfied when it takes an electronic form which is retrievable and capable of being authenticated, such as an electronic signature, certification by a neutral authority, or other methods that also ensure its integrity.

3. The New York Convention should be interpreted in a technologically neutral manner, ensuring that arbitral awards rendered and submitted electronically are not treated less favorably than those rendered and submitted in traditional formats.

4. Contracting States are encouraged to take measures to ensure that their courts and authorities have the necessary technical infrastructure and expertise to evaluate electronic arbitral awards in accordance with these aims.

C. Analysis

i. Introduction

7. The expansion of international trade in the aftermath of World War II highlighted the need for effective dispute resolution mechanisms in cross-border commercial transactions. The New York Convention emerged as a response to the widespread reluctance to engage in business with countries lacking robust judicial systems for enforcing contractual obligations.

8. Commercial arbitration, which had existed for generations, evolved into a more formal and sophisticated system following World War I, with many countries updating their arbitration legislation. Arbitration was perceived to offer benefits such as economy, speed, and confidentiality, even if these advantages are debated in today's international commercial arbitration circles.

9. The same impulses that led to the Protocol on Arbitration Clauses of 1923 and the Convention on the Execution of Foreign Arbitral Awards of 1927 came to the fore, and efforts to create a unified framework for recognizing and enforcing foreign arbitral awards began in the 1950s. The International Chamber of Commerce (ICC) and the United Nations Economic and Social Council (ECOSOC)

proposed draft conventions.[2] These initial proposals generated limited enthusiasm and did not progress significantly; yet they were first steps of the process toward the New York Convention.[3]

10. In the summer of 1958, during the United Nations ECOSOC Conference on International Commercial Arbitration, held at the United Nations Headquarters and attended by representatives from 45 nations, the final text of what is now the New York Convention was adopted.[4] The text was based on Dutch delegate Pieter Sanders' proposal, which simplified the enforcement process by eliminating the need for double exequatur.[5]

11. The New York Convention's primary goal was to establish uniform international standards for recognizing and enforcing foreign arbitral awards, significantly streamlining the process.[6] As of the date of submitting this proposal to the UNCITRAL Secretariat, 172 states have ratified the New York Convention, representing a remarkable achievement in international cooperation over the past 66 years.

12. While concerns about the effectiveness of national courts persist in some regions, the New York Convention has significantly eased the process of enforcing arbitration awards internationally. Over 3,000 national court decisions are reported in the Yearbook of Commercial Arbitration.[7] Kofi Annan, Former Secretary-General of the United Nations, in 1998 stated:

> *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. As you know, 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.*[8]

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[2] Enforcement of International Arbitral Awards. Report and Preliminary Draft Convention (ICC Publication No. 174 1953), reprinted in ICC Ct. Bull. 32, 32 (1998); Convention on the Recognition and Enforcement of Foreign Awards, Travaux Preparatoires - 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) (in the Annex); Convention on the Recognition and Enforcement of Foreign Awards, Travaux Preparatoires - Rep. on the Enforcement of International Awards (Resolution of the Economic and Social Council establishing the Committee, Composition and Organisation of the Committee, General Considerations, Draft Convention), Art. III(b), Annex at 1, U.N. Doc. E/2704 and U.N. Doc. E/AC.42/4/Rev.1 (Mar. 28, 1955) (The Annex contains the ECOSOC Draft).

[3] Marike R. P. Paulsson, The 1958 New York Convention in Action (Kluwer Law International, 2016), p. 4.

[4] Convention on the Recognition and Enforcement of Foreign Awards, Travaux Preparatoires – Summary record of the twenty-fifth meeting on 10 June 1958, U.N. Doc. E/Conf.26/SR.25 (Sep. 12, 1958)

[5] Convention on the Recognition and Enforcement of Foreign Awards, Travaux Preparatoires – Netherlands: amendments to Articles 3, 4, 5, Annex, U.N. Doc. E/Conf.26/L.17 (May 26, 1958).

[6] Convention on the Recognition and Enforcement of Foreign Awards, Travaux Preparatoires – Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards, U.N. Doc. E/Conf.26/8/Rev.1 (1958).

[7] ICCA Yearbook Commercial Arbitration, accessible at https://www.arbitration-icca.org/icca-yearbook-commercial-arbitration.

[8] 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 –

ii. Current discussions at UNCITRAL Working Group II: Dispute Settlement

13. Working Group II (A/CN.9/1190) proposes to develop an instrument for the recognition and enforcement of electronic arbitral awards, addressing the growing use of electronic means in arbitration proceedings, and ensuring that the legal framework keeps pace with technological advancements. It seeks to complement the New York Convention by providing a clear legal basis for the recognition and enforcement of awards issued electronically, including the definition of electronic awards and the interpretation of existing conventions in light of technological developments.

14. Bahrain cautions against misinterpreting language that appears explanatory but is actually designed to introduce a new treaty. The 1969 Vienna Convention on the Law of Treaties (VCLT), in Article 2, defines a "treaty" as:

> *an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.*[9]

15. This definition emphasizes three key elements: (i) it is an agreement between States, (ii) governed by international law, and (iii) creates obligations for those states. Therefore, whether it is called an instrument, supplementary convention, agreement, treaty, protocol, or by any other nomenclature, so long as it fulfills the elements, it functions as another treaty on the enforcement of awards.[10] The name given to an international agreement is not decisive of whether it is a treaty, though it may provide some evidence.[11] A new treaty is limited by realism, fragmentation, differing interpretations, compatibility challenges, and the same constraints offered by the notions of sovereignty. The Kingdom of Bahrain urges the delegates to revisit the origins of the New York Convention with the use of its drafting history records and interpret it in line with modern trade practices.

iii. Vienna Convention on the Law of Treaties

16. To determine whether an electronic award falls within the scope of the 1958 New York Convention, it should accordingly be examined through the lens of the Vienna Convention on the Law of Treaties, 1969 (VCLT).

17. Article 31 of the VCLT mandates a good faith interpretation, employing a teleological approach that aligns with customary practices, particularly those in international trade.[12] This interpretation should consider the ordinary meaning of terms within their context and in light of the treaty's object and purpose.

Experience and Prospects, 1 (United Nations 1999), as cited in Marike R. P. Paulsson, The 1958 New York Convention in Action (Kluwer Law International, 2016), p. 1.

[9] Article 2, Vienna Convention on the Law of Treaties (VCLT).

[10] D.P. Myers, in his work "The Names and Scope of Treaties" lists 40 different names for treaties. See D.P. Myers, The Names and Scope of Treaties, *American Journal of International Law*, Vol. 51(3), pp. 574-605.

[11] Richard K. Gardiner, Treaty interpretation (Oxford, 2008), p. 21.

[12] Article 31, VCLT.

18. Richard Gardiner, an authority on the VCLT, explains that "ordinary" refers to what was regular, normal, or customary at the time of the treaty's conclusion.[13] At the time of negotiating the New York Convention in the 1950s, telegrams, telexes, and paper awards, reflected the then modern international trade practices when defining terms dealing with the notion of "awards".

19. In today's digital economy, an ordinary reading might encompass modern practices of electronic signatures when defining an "award". In the future, practices could involve technologies one cannot yet foresee. In the summer of 1958, Argentina's delegate astutely observed:

> *The effectiveness of a law depended upon the extent to which it reflected reality.*[14]

20. There are sufficient bases in the New York Convention and its drafting history to argue that electronic awards should fall under the Convention, simply because it is customary in modern trade, and such a customary approach to interpreting a text is what the VCLT prescribes.[15] The flexibility inherent in the New York Convention's text, the drafters' intention, and means of interpretation accommodate evolving trade practices and allow for adjudicators to adapt their application without necessitating a new treaty.

21. It's worth noting that this debate is not new. Other visionaries were ahead in considering this issue, Gerold Herrmann observed:

> *While a-national (or "free-floating") awards are more common in the imaginative world of radical de-localizers than in the real world, we may wish to anticipate future space awards, rendered in cyberspace (virtual "CYBITRATION©" awards by seatless online arbitration centers) or in outer space ("ORBITRATION©" By the "Galactic Arbitration Center").*[16]

22. The drafting history of the New York Convention reveals that the delegates were focused on accommodating modern trade practices while being realistic about implementation, as demonstrated by the Japanese delegate's statement:

> *Japan whose economy and prosperity were affected in the manner in which international trade flowed, was always ready to assist in removing obstacles to such trade and thus to facilitate business intercourse.*[17]

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[13] Richard K. Gardiner, Treaty interpretation 127 (Oxford, 2008), as cited in Marike R. P. Paulsson, The 1958 New York Convention in Action (Kluwer Law International, 2016), p. 34.

[14] Convention on the Recognition and Enforcement of Foreign Awards, Travaux Preparatoires – Summary record of the fifth meeting on 22 May 1958, at 5, U.N. Doc. E/Conf.26/SR.5 (Sep. 12, 1958) (comments of Mr. Ramos (Argentina)).

[15] For an index of the New York Convention's drafting history, see Annex II: Consolidated List of Drafting History', in Marike R. P. Paulsson, The 1958 New York Convention in Action, (Kluwer Law International 2016), pp. 247 – 262.

[16] Gerold Herrmann, "Does the World Need Additional Uniform Legislation on Arbitration? The 1998 Freshfields Lecture, *Arbitration International*, Vol. 5 (1999), pp. 211–236, as cited in Marike R. P. Paulsson, The 1958 New York Convention in Action (Kluwer Law International, 2016), p. 112.

[17] Convention on the Recognition and Enforcement of Foreign Awards, Travaux Preparatoires – Summary record of the third meeting on 21 May 1958, at 2, U.N. Doc. E/Conf.26/SR.3 (Sep. 12, 1958) (comments of Mr. Urabe (Japan)).

The same sentiment is reflected in the Bulgarian delegate's statement:

> *[T]he conclusion of a convention would indirectly promote trade, in particular between countries belonging to different economic and social systems, and that it would also contribute to the development of international law and co-operation between nations…The primary purpose of the Convention should be to institute rapid, simplified, clear and efficient procedures for the elimination of the conseuqnces of differences and disagreements in business transactions.*[18]

23. Although there were attempts to define key terms like "arbitral awards" and "arbitration proceedings",[19] the delegates decided not to include strict definitions in the text. This decision was influenced by concerns about national sovereignty and public policy, as well as the desire to allow flexibility for different legal systems.

> *The recognition and enforcement of foreign arbitral awards raised complex problems. That explained why some provisions of the draft Convention were drawn up in rather general terms, whereas others contained some restrictions. That should not, moreover, be regarded as a defect but rather as a virtue, since it showed that its authors had tried to adapt it to reality, The variety of legal systems made it necessary to establish common standards which would state universally recognized principles, while respecting the sovereign rights of States and the principles on which their municipal law or public policy were based.*[20]

24. The travaux préparatoires show that references to specific technologies like telegrams or telexes in the text were meant to reflect contemporary customs rather than provide rigid definitions.

> *[I]t was not customary in international commerce to have documents signed by the two parties, even in very important transactions. An agreement which required a clause in writing would not meet present-day needs and would not be acceptable in international commerce.*[21]

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[18] Convention on the Recognition and Enforcement of Foreign Awards, Travaux Preparatoires – Summary record of the sixth meeting on 23 May 1958, at 2-3, U.N. Doc. E/Conf.26/SR.6 (Sep. 12, 1958) (comments of Mr. Todorov (Bulgaria)).

[19] Convention on the Recognition and Enforcement of Foreign Awards, Travaux Preparatoires – Summary record of the sixth meeting on 23 May 1958, at 5, U.N. Doc. E/Conf.26/SR.6 (Sep. 12, 1958) (comments of Mr. Kaiser (Pakistan)); Convention on the Recognition and Enforcement of Foreign Awards, Travaux Preparatoires – Comments by Governments on the draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, at 2-3, U.N. Doc. E/2822/Add.5 Annex (Apr. 13, 1956) (Hungary); Convention on the Recognition and Enforcement of Foreign Awards, Travaux Preparatoires – Pakistan: amendments to Articles 1, 3, 4, 56, 12 and suggestion of an additional Article, U.N. Doc. E/Conf.26/L.16 (May 26, 1958).

[20] Convention on the Recognition and Enforcement of Foreign Awards, Travaux Preparatoires – Summary record of the sixth meeting on 23 May 1958, at 5, U.N. Doc. E/Conf.26/SR.6 (Sep. 12, 1958) (comments of Mr. Farnes (Guatemala)).

[21] Convention on the Recognition and Enforcement of Foreign Awards, Travaux Preparatoires – Summary record of the thirteenth meeting on 28 May 1958, at 11, U.N. Doc. E/Conf.26/SR.13 (Sep. 12, 1958) (comments of Mr. Hoogstraten (Hague Conference on Private International Law)).

> *It is stated in article III(a) of the draft that, to obtain the recognition and enforcement of foreign arbitral awards, the parties must have agreed, in writing, either by a special agreement or by an arbitral clause in a contract, to settle their differences by means of arbitration. This provision would seem to restrict considerably the scope and importance of the Convention. It is not unusual practice in international trade to conclude an arbitration agreement by an exchange of letters or telegrams. It would therefore be better to stipulate simply that evidence in writing is required which proves the will of the two parties to settle their differences by means of arbitration.*[22]
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> *Obviously there could be no recognition of a purely verbal agreement, but neither could there be a requirement of writing in the strict sense, i.e. a requirement that both parties should sign the same document. Such a requirement would be at variance with the needs and usages of international trade.*[23]

25. By leaving the precise definitions of "award" and "arbitration" to national laws, the drafters allowed for adaptation to evolving trade practices. It was a blessing in disguise, and this flexibility has contributed to the New York Convention's enduring success and relevance.

26. Based on the drafting history, the Kingdom of Bahrain recommends that the term "award" in the New York Convention should be interpreted broadly to include electronic formats and other modern methods of recording arbitral decisions that may emerge in international trade. Such interpretation aligns with the New York Convention's original intent to facilitate and modernize international commercial arbitration practices.

iv. Proposal for UNCITRAL Recommendations or other Soft Law Mechanisms

27. The discussion surrounding potential reform highlights a critical juncture in international treaty law. Delegates considering small modifications should heed Article 40 of the VCLT, as minor changes could exacerbate fragmentation, particularly in a treaty with 172 contracting states. The notion of amendments between only certain parties, as stated in Article 41, also poses similar risks.

28. Regardless of its designation – be it a protocol, convention, or treaty – a new instrument creates binding obligations for states under international law. This raises compatibility issues with existing frameworks like the New York Convention, which may not be resolved through Article VII of the New York Convention.

29. For a protocol to gain acceptance from all 172 states, its text must be compelling, a text that could take years to draft and decades to implement. Moreover, as technology evolves rapidly, future awards may be unrecognizable when benchmarked to today's standards, all the more so considering the increasing disconnect between technological advancement and the pace of development of international law.

30. In 1958, the Japanese delegate commended the committee for achieving a balance between idealism and realism in their draft, though some nations felt it did not go far enough and preferred a more

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[22] Convention on the Recognition and Enforcement of Foreign Awards, Travaux Preparatoires – Comments by France, Annex I, at 18, U.N. Doc. E/2822 (Jan. 31, 1956).

[23] Convention on the Recognition and Enforcement of Foreign Awards, Travaux Preparatoires – Summary record of the ninth meeting on 26 May 1958, at 3, U.N. Doc. E/Conf.26/SR.9 (Sep. 12, 1958) (comments of Mr. Bulow (Federal Republic of Germany)).

ambitious proposal akin to that of the International Chamber of Commerce (ICC). The delegates departed from ideal phrasings as they negotiated less coherent formulations. The New York Convention had to accommodate many national procedural frameworks: perfection had to be sacrified.[24] The Japanese government expressed concern that the Chamber's pursuit of perfection overlooked the existing domestic laws of many countries. They argued that while the forthcoming convention should be progressive enough to meet international trade requirements, it must not be so radical as to deter potential signatories. This sentiment echoed a broader theme where distinguished delegates acknowledged an *"agreement to disagree,"* encapsulated in policies surrounding public policy, constitutionality, and sovereignty.[25]

> *The Japanese Government considered that the draft before the Conference was a progressive document and a substantial improvement over the Geneva Convention of 1927. The Ad Hoc Committee deserved high praise for having produced what was a sound compromise between idealism and realism. Some countries doubtless regarded the draft as not sufficiently far-reaching and would have preferred an instrument more along the lines proposed by the International Chamber of Commerce. His Government thought, however, that the Chamber, in its zeal for perfection, had failed to pay sufficient heed to the existing state of the domestic laws of many countries. While the Convention to be concluded should be sufficiently progressive to satisfy the requirements of international trade, it must not be so revolutionary as to discourage potential signatories.*[26]

31. Fali Nariman metaphorically described sovereigns as billiard balls, frequently colliding yet rarely moving in unison, concluding:

> *International law perhaps has not achieved much, but it is good that it is there.*[27]

32. This perspective was further illustrated by Stephen Schwebel, the former president of the International Court of Justice, who likened attempts to enhance the New York Convention through a treaty to an impossible dream reminiscent of Don Quixote's quests, suggesting that such aspirations were not merely Herculean tasks but rather unattainable ideals.[28]

33. The fear that efforts may ultimately lead to confusion is palpable, especially at a time when revisiting the New York Convention through a protocol-based methodology seems ill-advised. Historically, stakeholders in arbitration viewed themselves as merchants of peace, recognizing the benefits of peaceful commerce.

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[24] Marike R. P. Paulsson, The 1958 New York Convention in Action (Kluwer Law International, 2016), pp. 6-7.

[25] Marike R. P. Paulsson, The 1958 New York Convention in Action (Kluwer Law International, 2016), pp.. 3-9.

[26] Convention on the Recognition and Enforcement of Foreign Awards, Travaux Preparatoires – Summary record of the third meeting on 21 May 1958, at 2, U.N. Doc. E/Conf.26/SR.3 (Sep. 12, 1958) (comments of Mr. Urabe (Japan)).

[27] Fali Nariman, Introduction to the New York Convention, The Convention and Sovereignty, Judicial Dialogue on the New York Convention, 23 November 2013.

[28] Judge Schwebel's comments are recalled in Marike Paulsson, Commercial Diplomacy as a Way Forward to Resolving Disputes When They Arise in International Trade, Kluwer Arbitration Blog, 22 August 2018.

34. Unlike theorists who draft idealistic texts, the sole task of UNCITRAL's Working Group II is to empower our judiciaries to regard the text as a living breathing document. The Kingdom of Bahrain proposes, as a next step in relation to the compatibility of the New York Convention and electronic awards, a draft text to be issued as UNCITRAL recommendations. The Working Group can consider Bahrain's proposal in the form of an Article II Recommendations, or in that of a restatement or soft law guidance note. Given that judges may not have the capacity to sift through extensive case law and drafting history through the specialized lens of the VCLT, a New York Convention Restatement crafted by UNCITRAL or similar soft law tools could provide a valuable and practicable solution.