

**Pros and cons:  
New New York Convention?**

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# NYC Day 1998



“The question thus becomes: What could or should we do 40 years later for the next 40 years to come? ... [What about the proposal for] amending the Convention in the form of a protocol or even a new convention?”

“I submit that such an action will not be understood by many Contracting States. They believe that the Convention is very helpful and simple. Why change it? To do so may undermine the credibility of the Convention. And honestly: Are the items on the ‘wish list’ really so compelling that they justify the trouble of adopting a new international treaty?”

"If it ain't broke, don't fix it."



Albert Jan van den Berg, Striving for uniform interpretation

# NYC Day 1998



“The New York Convention reflects the realities of international arbitration of the 1950s. It is still a surprisingly modern instrument...”  
„However, the world of international arbitration has changed since the creation of the Convention. I should think that it would be useful to envisage, therefore, an additional convention complementary to the Convention which would deal with issues which have arisen in the practice of international arbitration during the last 40 years.“



Werner Melis, Considering the advisability of preparing an additional Convention

# General considerations



**No need**

**Confusion**

“All problems can be resolved by appropriate judicial interpretation.”

**90%**

“The shortcomings cannot be remedied by interpretation, model legislation or interpretative instruments.”

**Outdated**

**Inappropriate**

**???**

# The Wish List

- (a) The absence of a global field of application of the Convention;
- (b) The written form requirement of the arbitration agreement;
- (c) The possibility of enforcement of interim measures;
- (d) Discretionary power to enforce an award where a ground for refusal exists;
- (e) Waiver of a ground for refusal of enforcement;
- (f) The annulment of the award in the country of origin; and
- (g) Procedure for enforcement of a Convention award.

**Scope**

**Arbitration  
agreement**

**Interim  
measures**

**Grounds**

**Procedure**

# Scope

- The NYC 1958 does not apply to the enforcement of arbitral awards made in the country of origin (the notion of “foreign” and “international”);
- The notion of “commercial”: possibility to use the reservations, dependant on the law of the country of enforcement;



# Scope

- Scope issues are resolved by the national arbitration law.
- Should UNCITRAL abandon “international” and “commercial”?
- There were no major problems with reservations (but there may be if they are not permitted).
- One needs a uniform and harmonized regime for enforcement of domestic and foreign awards.
- There should be a definition of “international” as in the UNCITRAL Model Law.
- Reservations should be discouraged.



# Arbitration agreements

- The NYC 1958 does not define arbitration agreements to which it relates.
- No rules on mandatory referral to arbitration.
- The strict rules on written form of the arbitration agreement.



# Arbitration agreements

- The courts have enforced the agreements that would produce the enforceable awards.
- The form requirements were interpreted in a broad way by many courts.
- The revised UML and the recommendation on interpretation resolve the problem.
- It is needed to have universal and harmonized rules. The courts do not follow the same approach.
- The text of the NYC literally requires a strict written form.
- Not all legal cultures and traditions allow changing the black-letter law by interpretation.

# Interim measures

- The NYC 1958 does not contain clear rules on the enforceability of arbitrators' decisions on interim measures.
- Otherwise, no rules on the enforcement of specific types of awards (partial, interlocutory etc.) exist in the NYC.



# Interim measures

- Revision of the UML provides universal solutions for interim measures.
- The revised UNCITRAL Arbitration Rules will contribute to harmonisation.
- Are we ready for the uniform solutions?
- No harmonized approach to the enforcement of interim measures.
- Arbitral interim measures still not enforced in a large number of countries.
- The hoax of “ex parte” has to be uniformly resolved.

# Grounds

- Some courts consider that grounds for refusal of enforcement are not exhaustive.
- Some courts consider that they may enforce an award even if there is a ground for refusal.
- Some grounds are ambiguous and open to different interpretations.
- No rules on waiver of the grounds for refusal.
- Specific issue of the enforcement of awards that were set aside in the country of origin.



# Grounds

- Generally, the courts have applied the grounds from the NYC correctly.
- Grounds for refusal are broadly accepted, also inserted in the UML and many national laws.
- Divergent views on enforceability are not the fault of the Convention.
- Grounds for refusal should be drafted in a more consistent or narrower way.
- The borders of discretion to enforce / not to enforce an award must be clearly defined.

# Procedure

- The procedure of enforcement is regulated by national law;
- Different time-limits for enforcement;
- More or less onerous conditions for applicants: costs, fees, documents to be submitted;
- Excessive formalism in interpretation of some provisions (e.g. “duly authenticated”);
- Jurisdiction and legal remedies are vastly different, as well as the timeframes needed for enforcement.



# Procedure

- harmonization of procedures can be achieved by softer means (education, guides);
- it is difficult to expect harmonization in matters inherent to national procedural laws;
- the jurisdiction and legal remedies depend on constitutional specificities and national legal culture and tradition.
- a special international instrument on procedure of enforcement is needed;
- some points of divergence have to be unified (e.g. time-limit, costs);
- some formal requirements have to be relaxed (duly authenticated);
- the approach to jurisdiction should be harmonized.



**Is it broke?**

**There will be benefits from the new convention...**

**Even if - does it pay off to start preparing a new convention?**

**Can we solve all problems  
by interpretation?**

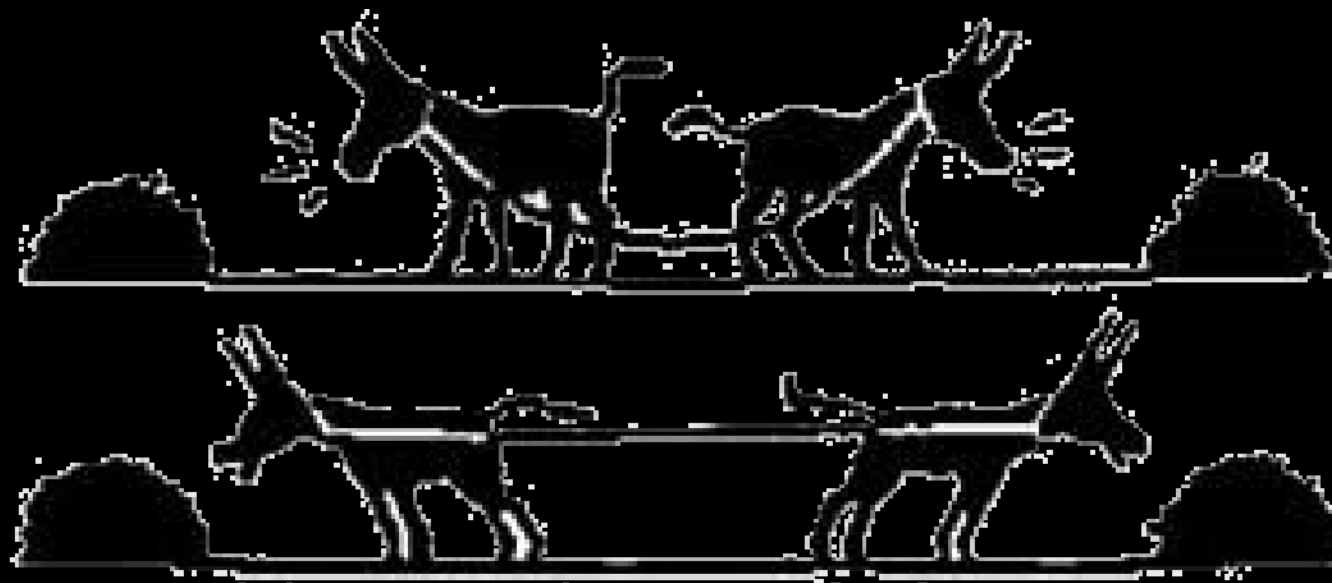
# BURIDAN'S ASS CONTEMPLATING THE ISSUE...



... between 50th and 60th anniversary of the NYC...



New York Convention 1958



**Thank you!**